DOCUMENT RESUME

ED 433 556 CS 510 137

TITLE	Proceedings of the Annual Meeting of the Association for Education in Journalism and Mass Communication (82nd, New Orleans, Louisiana, August 3-8, 1999). Law.
INSTITUTION	Association for Education in Journalism and Mass Communication.
PUB DATE	1999-08-00
NOTE	279p.; For other sections of this proceedings, see CS 510 132-153.
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	MF01/PC12 Plus Postage.
DESCRIPTORS	Copyrights; *Court Litigation; Electronic Mail; Federal Regulation; Freedom of Speech; Higher Education; Internet; Journalism Education; *Legal Problems; Libel and Slander; Newspapers; Privacy; Speech Communication; Violence
IDENTIFIERS	Communications Decency Act 1996; First Amendment; *Privacy Protection Act 1980

ABSTRACT

The Law section of the Proceedings contains the following 10 papers: "The Driver's Privacy Protection Act of 1994: Does Congress Have the Constitutional Authority to Override State FOI Laws by Regulating Access to State Driver's Licenses?" (Joey Senat); "The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media" (Karen M. Markin); "'Reno v. ACLU' and its Progeny: Implications for Communication Professionals" (Truda Shinker); "Actual Malice: How Badly Does a Journalist Have to Behave for a Politician to Win a Libel Suit?" (Ginny Carroll); "Crumbling Barriers to Newsroom Searches: The Erosion of the Privacy Protection Act of 1980" (Dan Shaver); "Ban Spam?: Exploring the Legal Issues and Constitutionality of Federal and State Statutes and Bills Regulating Junk Email" (Hwi-Man Chung); "News or Nuisance? Regulation of Home Delivery of Free Newspapers" (Andy Bechtel); "'Moral Rights' Versus Amoral Rights, 'Fair Dealing' Versus 'Fair Use': A Comparison of the Copyright Statutes of Canada and the United States" (Laura Hlavach); "Incitement: Hit Men, Hit Lists and Hit Movies" (Lorna Veraldi); and "Dangerous Liaison: Speech in a Climate of Violence" (Josie Tullos). (RS)

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1999-08

CS 510 137

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THE DRIVER'S PRIVACY PROTECTION ACT OF 1994: DOES CONGRESS HAVE THE CONSTITUTIONAL AUTHORITY TO OVERRIDE STATE FOI LAWS BY REGULATING ACCESS TO STATE DRIVER'S LICENSES?

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Presented to
Law Division, AEJMC National Conference
New Orleans: August 4-7, 1999

THE DRIVER'S PRIVACY PROTECTION ACT OF 1994: DOES CONGRESS HAVE THE CONSTITUTIONAL AUTHORITY TO OVERRIDE STATE FOI LAWS BY REGULATING ACCESS TO STATE DRIVER'S LICENSES?

Just days before the Driver's Privacy Protection Act[1] (DPPA) severely restricted public access to millions of driver's licenses nationwide in September 1997, federal district judges in South Carolina[2] and Oklahoma[3] declared the federal statute unconstitutional in those states. As earlier research[4] had predicted, the judges ruled that Congress had violated the Tenth Amendment in enacting the DPPA.

Since those initial rulings, three[5] more federal courts, including two circuit courts of appeals, have held against the statute, while three[6] federal courts, including two circuit courts of appeals, have favored it. Now the question of whether Congress exceeded its power by requiring states to restrict the release of personal data on driver's licenses will be answered by the U.S. Supreme Court likely sometime early next year.[7] The Court agreed in May to hear the Department of Justice's appeal of the Fourth Circuit decision in the South Carolina case.

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[1] Driver's Privacy Protection Act of 1994, 18 U.S.C.A. §§ 2721-2725 (West Supp. 1998).

[2] Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997).

[3] Oklahoma v. United States, 994 F. Supp. 1358 (W.D. Okla. 1997).

[4] Joey Senat, *The Driver's Privacy Protection Act of 1994: Does Congress Have the Constitutional Authority To Regulate Access to State Driver's Licenses?* Southeastern Regional Colloquium of the History, Law, and Newspaper Divisions of the Association for Education in Journalism and Mass Communication, Roanoke, Va., March 1996; and Jerome L. Wilson, *Keep State Auto Files Accessible and Public*. NAT'L L.J., Feb. 7, 1994, at 15, 16.

[5] Pryor v. Reno, 171 F.3d 1281 (11th Cir. 1999); Condon v. Reno, 155 F.3d 453 (4th Cir. 1998); and Travis v. Reno, 12 F. Supp.2d 921 (W.D. Wis. 1998).

[6] Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998); Oklahoma v. Reno, 161 F.3d 1266 (10th Cir. 1998); and Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998).

[7] Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *cert. granted*, No. 98-1464 (U.S. May 17, 1999); *see also*, *Court to Judge Validity of Law that Keeps Driver's License Information Private*, AP, May 17, 1999; Michael Kirkland, *Court to Weigh Driver Privacy Limits*, UPI, May 17, 1999; *U.S. High Court to Mull Driver's License Data Law*, Reuters, May 17, 1999.

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Congress, though, may not wait for a finding by the High Court that the DPPA is unconstitutional before trying to find another way to force states to limit the release of personal information and photographs contained in drivers' licenses. A proposed appropriations bill in the U.S. Senate would link the release of such information to federal transportation funding; to receive federal highway funds, states would be prohibited from releasing the information, without the written consent of the driver, to anyone but law enforcement agencies.[8] In reviewing the DPPA, though, two courts noted that such an approach under the Spending Clause requires that "the statute must bear at least some relationship to the purpose of the federal spending."[9] "We are hard pressed to see a connection between a privacy statute and highway funds," commented the Fourth Circuit Court of Appeals.[10] The court noted that even if Congress could have conditioned states' receipt of federal highway funds on compliance with the DPPA, it had not done so.

The DPPA, also known as the Boxer-Moran Bill, was intended to prevent stalkers and anti-abortion protesters from locating people using information from state Department of Motor Vehicle records.[11] Media organizations, however, argued that access to those records has produced more good than harm.

For example, in 1991, the *Miami Herald* used DMV records to document how Florida failed to keep convicted drunk drivers off the road. The newspaper found nearly 500 drivers in four counties who each had six or more DUI convictions but were still driving.[12] The *Orlando Sentinel* in 1986 used DMV records to locate the homes of dozens of Kennedy Space Center workers. Interviewed at home and away from management,

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[8] S. 1143, 106th Cong., 1st Sess., Title III § 339 (1999) (Department of Transportation and Related Agencies Appropriations Act, 2000).

[9] 155 F.3d at 463, n.6; *see also*, 12 F.Supp.2d at 925 ("Congress may use its spending power to 'attach conditions on the receipt of federal funds' so long as a nexus exists between these conditions and the purpose of the federal spending," *citing* New York v. United States, 505 U.S. at 167 (1992)).

[10] 155 F.3d at 463 n.6.

[11] Jennifer S. Thomas, *Crime Bill Restricts Access to Records*, St. Pete Times, Aug. 26, 1994.

[12] Testimony by Richard A. Oppel, Washington Bureau Chief for Knight-Ridder, before the House Judicial Subcommittee on Civil and Constitutional Rights, Feb. 4, 1994.

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the workers told of quality control and safety problems at NASA that had led to the Space Shuttle Challenger explosion.[13]

Though a conflict between opposing social values – individual privacy and public access to government records – is at the heart of the Driver's Privacy Protection Act, only four of the courts to review the statute have examined even tangentially whether a constitutional right of privacy precludes the disclosure of DMV records, and only one court has determined if the First Amendment requires those records be open. Instead, judicial interpretation of the statute has centered squarely on whether Congress exceeded its authority under the Commerce Clause in violation of the Tenth Amendment. It seems probable then that the U.S. Supreme Court ruling on the constitutionality of the Driver's Privacy Protection Act also will hinge on Tenth Amendment analysis.

Prior to the statute's passage, the only detailed legal analysis published on the DPPA contended that it was unconstitutional on three counts.[14] In *The National Law Journal*, Jerome L. Wilson, a New York lawyer and former journalist, argued that the statute violated (1) a First Amendment right of public and press access to governmental information such as DMV records; (2) the First Amendment because it discriminated against the press by denying it the same access to government records afforded to other groups; and (3) the Tenth Amendment by forcing states to enact a federal regulatory scheme. No academic legal analysis of the Act or of the courts' evaluation of it has been published.

The purpose of this paper is to update and expand Wilson's research by exploring the reasoning used by the courts and then determining whether the federal government has the constitutional authority to close records created, maintained and deemed open by states. Specifically, the paper will address the following questions:

1. Does the Tenth Amendment reserve to the states, not Congress, the exclusive power to regulate access to state motor vehicle records?
2. Does a constitutional right of privacy exist in the nondisclosure of confidential information? If such a constitutional right exists, do drivers have a reasonable expectation that state motor vehicle record data, as outlined by the Driver's Privacy Protection Act, will be kept secret?

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[13] *Id.*

[14] Wilson, *supra* note 4.

3. Does a First Amendment right of access to governmental information prohibit the Driver's Privacy Protection Act from denying the press and public access to state motor vehicle records?

This research will begin by examining the statute's history, journalists' concerns regarding it, and the statute itself.

I. BACKGROUND

The Driver's Privacy Protection Act was "a little-noticed provision" slipped into the otherwise much debated 355-page 1994 Crime Bill.[15] In late October 1993, Sen. Barbara Boxer, a California Democrat, announced the DPPA at a Washington news conference.[16] Boxer urged its passage as a means of preventing stalkers from obtaining the home addresses of victims and of stopping anti-abortion extremists from tracking down abortion doctors and patients.[17]

"Proponents of the Boxer bill provided no statistical evidence to support their case that open DMV records posed a grave danger, but sprinkled their arguments with a handful of anecdotes to illustrate their point," wrote Christopher Callahan in *American Journalism Review*.[18] Cited most often was the murder of actress Rebecca Schaeffer, who in 1989 was shot to death on the front porch of her Los Angeles apartment by an obsessed fan.[19] The stalker got Schaeffer's department of motor vehicle information from a private investigative agency. Ironically, private investigators retained their access to DMV data under a provision in the final version of the bill.

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[15] Christopher Callahan, *License Revoked*, AJR., November 1995, at 40-44.

[16] *Id.* at 40.

[17] Jennifer S. Thomas, *supra* note 11; Callahan, *supra* note 15, at 40.

[18] Callahan, *supra* note 15, at 41.

[19] Michelle Millhollon, *Countdown to Closure: Don't Let the Door Hit You on Your Way Out of the DMV Office*, Quill, October 1995, at 26, 27; Callahan, *supra* note 15, at 42.

The DPPA "exemplifies the built-in conflict between the individual's right to privacy and the public's right to know."[20] First Amendment advocacy organizations "fear the logic behind the law – that open records constitute an invasion of privacy and an invitation to stalkers – could lead to similar government shutdowns of voter registration and other public records that have long been staples of investigative reporting."[21]

To make their case for access, journalists have contended that DMV documents are "legitimate public records that provide invaluable information to citizens."[22] For example, in October 1985, the *Providence Journal-Bulletin*, using a computerized list of driving records from the state DMV, documented that some school bus drivers had among the worst driving records in the state.[23] Other computer analyses of motor vehicle records have uncovered Minnesota airline pilots who had lost their driving privileges because of alcohol abuse and racial disparity in the issuance of traffic tickets in Houston.[24] Yet, the Senate passed the measure with no hearings, little debate and no opposition just three weeks after the bill's introduction.[25]

The Driver's Privacy Protection Act bars the disclosure of personal information from state DMV records. Personal information is defined under the law as individually identifiable data, including photograph, Social Security number, driver identification number, name, address (but not the five-digit zip code), telephone number, and medical or disability information. Information on vehicular accidents, driving violations and driver's status is not closed to public inspection by the DPPA. Only those disclosures specifically authorized in the statute are allowed. The DPPA requires that personal information be disclosed for use in several legally mandated motor vehicle activities:

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[20] Drew Sullivan and Howard Goldberg, *Public speaking out on privacy concerns*, Quill, September 1997, at 17-19.

[21] Callahan, *supra* note 15 at 40.

[22] *Id.* at 41.

[23] *Id.* at 40.

[24] Callahan, *supra* note 15, at 40; Millhollon, *supra* note 19, at 26.

[25] Callahan, *supra* note 15, at 42.

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- vehicle or driver safety and theft programs;
- emissions control;
- product alterations, recalls or advisories;
- performance monitoring of vehicles and dealers by manufacturers; and
- activities mandated by five federal laws regulating motor vehicles.

The statute also permits personal information to be disclosed for 14 additional uses, including for bulk distribution of surveys, marketing or solicitations.[26] State agencies not complying with the law can be fined up to $5,000 a day. Individuals violating the law by disclosing or receiving banned information could receive criminal fines. Persons violating the law also could be sued in federal court by the subject of the records request.

In effect, the Driver's Privacy Protection Act superseded state freedom of information laws, state common law and state constitutions that had already deemed

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[26] In addition to the legally mandated motor vehicles activities for which disclosure of personal information is required, the Driver's Privacy Protection Act permits the information to be disclosed for 14 other uses:

1. for use by any government agency or its agent in carrying out its function;
2. for motor vehicle regulatory and control activities;
3. for verifying the accuracy of information submitted by an individual to a business;
4. for use in any judicial proceeding, including the service of process, investigations in anticipation of litigation, and the execution of court orders;
5. for use in research and statistical activities, as long as the personal information is not published, redisclosed, or used to contact individuals;
6. for use by an insurer in connection with claims investigations, anti-fraud activities, rating, or underwriting;
7. to provide notice to owners of towed or impounded vehicles;
8. to a licensed private investigative agency for any of the other permitted purposes;
9. for an employer to verify information relating to the holder of a commercial driver's license;
10. for use in connection with private toll transportation facilities;
11. for any other use if individuals are told of the possibility of a disclosure to any requester and are given a clear opportunity on operator's permits, titles, registrations or identification cards to prohibit the disclosure;
12. for bulk distribution for surveys, marketing, or solicitations if individuals have been given an opportunity to prohibit such use;
13. for any other use if the subject of the records request has given written consent; and
14. for any use specifically authorized under state law if the use is related to the operation of a motor vehicle or public safety.

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driver's license and vehicle registration information open records in 42 states.[27] States were permitted to keep DMV records open only if their legislatures voted to do so and if they allowed drivers the option of keeping "personal" information secret. When the statute took effect in September 1997, legislatures in 31 states had approved an "opt-out" policy.[28]

This research paper now will examine recent Supreme Court decisions involving the Tenth Amendment and how federal courts have interpreted the Driver's Privacy Protection Act in light of those rulings.

II. TENTH AMENDMENT

The Department of Justice has contended in court that the federal government's power to regulate interstate trade under the Commerce Clause gave Congress the authority to enact the Driver's Privacy Protection Act.[29] However, congressional power under the Commerce Clause is constrained by the Tenth Amendment,[30] which reserves to the states the powers not explicitly delegated to the federal government by the Constitution. The Fourth Circuit Court of Appeals framed the issue as "not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution."[31]

Since the 1930s, however, the Tenth Amendment has been overshadowed by the Commerce Clause. Congress has routinely relied on an interpretation of the Commerce Clause reached during the New Deal for authority to regulate matters once "thought to be the exclusive purview of the states."[32] The common wisdom has been that there just was no practical limit to what Congress could do under the Commerce Clause.[33] In spring 1995, however, the Court for the first time in 60 years struck down a congressional enactment as beyond Congress' power under the Commerce Clause.

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[27] Jerome L. Wilson, Rogers & Wells, *Constitutional Issues Raised by the Driver's Privacy Protection Act of 1993*, New York, N.Y. (1994).

[28] Lauri Schumacher, *Driver records still in jeopardy*, Quill, September 1997, at 23-25.

[29] U.S. CONST. art. I, § 8, cl. 3, provides Congress the power to "regulate Commerce . . . among the several states."

[30] U.S. CONST. amend. X, provides "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

[31] 155 F.3d at 458; *see also*, 161 F.3d at 1268. "The question presented is whether the DPPA is a valid exercise of congressional power to which contrary state law must yield consistent with principles of federalism and the Tenth Amendment. . . ."

In *United States v. Lopez*, the Court tested the Commerce Clause against the Tenth Amendment.[34] In a 5-4 decision, the Court held that a federal law barring the possession of guns within 1,000 feet of a school exceeded Congress' Commerce Clause authority. The *Lopez* case bolstered Jerome L. Wilson's contention that the Driver's Privacy Protection Act could be challenged on Tenth Amendment grounds. In an October 1995 *Quill* article on the statute, he was paraphrased as saying that it "infringes on states' rights by mandating what they must do with their records."[35] The *Lopez* ruling spurred the North Carolina Press Association and other press advocates to approach their attorneys general about mounting a Tenth Amendment challenge to the DPPA.[36]

When Congress exercises its Commerce Clause power against the states, the Supreme Court analyzes the statute under two lines of cases.[37] The *Garcia*[38] line of cases concerns the authority of Congress to regulate the states as states. Under this line, Congress may enact generally applicable statutes that incidentally apply to the functioning of state government. For example, in 1968, the Court in *Maryland v. Wirtz* first ruled that Congress could subject state governments to generally applicable laws.[39] Though the Court flip-flopped briefly on the issue, it returned to the reasoning in 1985 in

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[32] Michael Rezendes, *Reading Their Rights: Gun Lobby Challenging 2d Amendment's Interpretations*, Boston Globe, Sept. 10, 1995.

[33] Joseph Calve, *Anatomy of a Landmark Ruling*, Legal Times, Aug. 14, 1995.

[34] 115 S.Ct. 1624 (1995).

[35] Millhollon, *supra* note 19, at 27.

[36] Callahan, *supra* note 15, at 40; Millhollon, *supra* note 19, at 26.

[37] *See* 505 U.S. 144, 160-161, and 155 F.3d at 458.

[38] Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985).

[39] 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

Garcia,[40] ruling that Congress may subject states to legislation that also is applicable to private parties. The same principle was applied again in 1988, when the Court in *South Carolina v. Baker* ruled that states could be required to issue bonds in registered form because the challenged taxation statute "covers not only state bonds but also bonds issued by the United States and private corporations."[41]

The other line of cases, which includes *New York v. United States* and *Printz v. United States*, concerns the authority of Congress to direct the states to implement or administer a federal regulatory policy. Under this line of reasoning, Congress may not direct the functioning of the states' executives or legislatures. In administering or enforcing federal regulations, the federal government must bear both the monetary and political costs of regulation.

In 1992, the Court held in *New York* that Congress had trampled on state sovereignty when it made each state responsible for regulating the disposal of low-level radioactive nuclear waste produced within its borders.[42] Congress had "crossed the line distinguishing encouragement from coercion."[43] States were directly compelled to "enact and regulate a federal regulatory program" and could not decline to administer it, the Court noted. The Court said that under the Tenth Amendment, Congress "may not commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program."[44] Even though the "Constitution . . . gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation . . . it may not conscript state governments as its agents," the Court said.[45]

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[40] In National League of Cities v. Usery, 426 U.S. 833, 855, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Court overturned Wirtz, holding that the Commerce Clause did not give Congress the power to regulate the "States as States." However, in Garcia, the Court overturned National League of Cities.

[41] 485 U.S. 505, 510, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988).

[42] 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[43] 112 S.Ct. at 2428.

[44] *Id.*

[45] *Id.* at 2429.

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Then it explained:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty" . . . reserved explicitly to the States by the Tenth Amendment.[46]

In *Printz,* the Court in 1997 struck down the portion of the federal Brady Handgun Violence Prevention Act that required local law enforcement officials to conduct background checks on prospective handgun buyers.[47] The Court framed the issue as "the forced participation of the States' executive in the actual administration of a federal program."[48] Based on its precedents, the Court decided "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[49] The Court rejected the federal government's reliance on the *Garcia* line of cases because in this case "it is the *whole* object of the law to direct the functioning of the state executive."[50] Said the Court:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible without constitutional system of dual sovereignty.[51]

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[46] *Id.* at 2434-2435.

[47] 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

[48] 117 S.Ct. at 2376.

[49] *Id.* at 2380.

[50] *Id.* at 2383.

[51] *Id.* at 2384.

Applying Tenth Amendment Analysis to the Driver's Privacy Protection Act. How federal courts ruled on the DPPA's constitutionality under the Tenth Amendment and the Commerce Clause hinged on whether the judges viewed the statute as requiring either an action or passivity on the part of states. Three courts agreed with the federal government's argument that the statute falls under the reasoning used in the *Garcia/Baker* line of cases and thus is a constitutional, generally applicable law setting a federal standard that simply requires states to passively withhold information. Five federal courts, however, relied upon the *New York/Printz* line to find that the DPPA violates the Tenth Amendment because it requires states to actively administer an unfunded federal regulatory program banning the disclosure of personal information in motor vehicle records.[52]

In striking down the statute, the Eleventh Circuit and a split Fourth Circuit Court of Appeals recognized that the Driver's Privacy Protection Act is different from the statutes struck down in *New York* and *Printz*. The DPPA does not compel states to enact legislation. It does not conscript state officials to enforce the regulations by reporting violations, arresting violators, or even helping the federal government search for potential violations.[53] Nevertheless, each court said, the DPPA still directs state officials to administer a federal regulatory program. The Eleventh Circuit called it "a detailed set of rules under which Alabama's disclosure or refusal to disclose to third parties the personal information in its motor vehicle records shall be done as the federal establishment wishes it to be done. No one disputes that Congress, through the DPPA, has enacted a federal regulatory program to control the dissemination and cloaking of the States' motor vehicle information."[54] Because the statute "is neither self-administrating nor self-enforcing," state officials must ensure that "protected information is disclosed only for the designated purposes specified by the federal rules," the Eleventh Circuit reasoned.[55] Said the Fourth Circuit, "The Supreme Court, in both

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[52] Pryor v. Reno, 171 F.3d 1281 (11th Cir. 1999); Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), 972 F. Supp. 977 (D.S.C. 1997); Travis v. Reno, 12 F. Supp.2d 921 (W.D. Wis. 1998); and Oklahoma v. Reno, 994 F. Supp. 1358 (W.D. Okla. 1997).

[53] 171 F.3d at 1285, and 155 F.3d at 460.

[54] 171 F.3d at 1285-86.

[55] 171 F.3d at 1286.

New York and *Printz*, has made it perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program."[56]

Federal District Judge Dennis W. Shedd of South Carolina, whose ruling the Fourth Circuit Court of Appeals upheld, had concluded that in enacting the DPPA, Congress was not assuming direct responsibility for the dissemination and use of the records that are unquestionably the responsibility and property of the states. Wrote Shedd:

> Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records. In order to comply with Congress' directive, the States are forced by the threat of administrative penalty (and indirectly by civil and criminal sanction) to take measures to prohibit access by their citizens to the motor vehicle records.[57]

Similarly, U.S. District Judge Barbara B. Crabb of Wisconsin found that the statute established "a detailed set of rules to control the circumstances under which" the state could disclose certain motor vehicle information; those rules displaced conflicting state law; and "the federal government has no role in this process, financially or otherwise." Said Judge Crabb, "If this does not describe a federal law that directs state officials to administer or enforce a federal regulatory program, the standard articulated by the Supreme Court in *New York* and *Printz* has done great damage to the English language."[58]

The Department of Justice had argued that *New York* and *Printz* only prohibited federal statutes that required states to regulate the behavior of their citizens. Therefore, those cases were inapplicable because the DPPA did not compel states to require or prohibit any acts of their citizens. Judge Shedd, the Eleventh Circuit Court of Appeals, and the Fourth Circuit Court of Appeals majority, though, described that reading of those cases as narrow.[59]

The federal government contended that *Garcia* applied instead because the DPPA simply regulated a state activity, the disclosure of motor vehicle record information. The statute, government attorneys argued, "simply represents a federal regulation of business-related activities that substantially affect interstate commerce, activities in which some States happen to be engaging."[60] In other words, the Driver's Privacy Protection Act merely requires states to conform their conduct to federal standards.

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[56] 155 F.3d at 460.

[57] 972 F. Supp. at 984-85.

[58] 12 F. Supp.2d at 928.

[59] 972 F. Supp. at 985, 171 F.3d at 1286, and 155 F.3d at 461.

Those courts disagreed, though, finding that the DPPA is not a law of general applicability that incidentally applies to the States, but rather is, as the Fourth Circuit Court of Appeals majority said, "a law that, for all intents and purposes, applies *only* to the States."[61] The DPPA does not attempt to regulate the disclosure of personal information contained in private databases but instead regulates only the release of such information contained in state motor vehicle records.[62] Said Judge Crabb in Wisconsin: "To state the obvious, the Driver's Privacy Protection Act is not a law of general applicability. Only states collect driver's license and motor vehicle information and, if they so choose, disseminate it."[63] The Eleventh Circuit said that "[i]nstead of bringing the States within the scope of an otherwise generally applicable law, Congress passed the DPPA specifically to regulate the States' control of the States' own property – the motor vehicle records."[64] Similarly, U.S. District Judge David L. Russell of Oklahoma noted that "even a cursory review of the statute indicates that is it directed at States."[65] Russell found that the statute requires state DMV's "to create and maintain systems to enforce the federal law of non-disclosure" and therefore "seeks to treat the Oklahoma Department of Public Safety as a subdivision of the United States. The Act, focusing on information gathered by the State, from its citizens, seeks to dictate when and to whom information may be released."[66] In essence, these courts concluded, the Driver's Privacy

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[60] 972 F. Supp. at 985.

[61] 155 F.3d at 456 (emphasis in original).

[62] *Id.* at 460–463.

[63] 12 F. Supp.2d at 929.

[64] 171 F.3d at 1287.

[65] 994 F. Supp. at 1362, in which Russell observed: "The first sentence states that the Act applies to 'a State department of motor vehicles, and any officer, employee, or contractor thereof.' Although the law also prevents individuals from disseminating information received from the State, the law is directed not at the individuals, but at the State."

[66] *Id.* at 1363.

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Protection Act unconstitutionally requires states to create and maintain a system to enforce a federal policy.

Three federal courts, however, have found the statute to be permissible under the Tenth Amendment.[67] They concluded that the statute neither commandeered states' legislative processes by requiring them to enact statutes regulating the disclosure of personal information regarding drivers nor conscripted state officials to enforce a federal law. Instead, these courts found that the DPPA involved the proper exercise of Commerce Clause power to set a federal standard regulating interstate commerce and thus preempt contrary state legislation.

These courts did not find *New York* and *Printz* controlling. For example, the Tenth Circuit Court of Appeals and U.S. District Judge De Ment of Alabama said they found the arguments against the DPPA "much less compelling than the arguments against the statutes at issue in *New York* and *Printz*."[68]

Just as the Eleventh and Fourth circuit courts of appeals had done, the Tenth Circuit and Judge De Ment noted that unlike the statutes in *New York* and *Printz*, the DPPA "does not commandeer the state legislative process by requiring states to enact legislation regulating the disclosure of personal information from motor vehicle records." Nor does the DPPA, as the statute in *Printz* had done, "conscript state officials to enforce federal law," the Tenth Circuit Court of Appeals also observed.[69] However, unlike the conclusion by the Eleventh and Fourth circuits that the DPPA still unconstitutionally required state officials to administer the DPPA, the Tenth Circuit Court of Appeals and Judge De Ment interpreted the statute differently. "If states do not wish to comply with those regulations, they may stop disseminating information in their motor vehicle records to the public," wrote the Tenth Circuit. "In contrast, the statute in *New York* offered no such alternative to the states."[70] Responsibility for enforcing the law belongs not to state officials, but to federal officials, both courts concluded. Wrote Judge De Ment:

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[67] Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998); Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998); and Pryor v. Reno, 998 F. Supp. 1317 (M.D. Ala. 1998).

[68] 161 F.3d at 1271-72. *See also*, 998 F. Supp. at 1329, which "finds that the DPPA is not the type [of] federal legislation prohibited by *New York* and *Printz*."

[69] 161 F.3d at 1272.

[70] *Id.*

> [T]he DPPA neither asks State officials to arrest or report violators of the DPPA, nor does it require States to ensure that state citizens do not use, sell or otherwise disclose personal DMV information. Unlike the provision at issue in *Printz*, the DPPA requires no affirmative action by the State or its officers. Rather, the DPPA merely prohibits States from disclosing personal DMV records for any impermissible purpose."[71]

Judge Crabb in Wisconsin disagreed with that conclusion, noting that the statute "is not self-enforcing or self-administering: someone must do something to insure that the state is in compliance with the act. Specifically, states must disclose personal information to carry out various federal statutes . . . and state employees are required to review requests for information to determine whether such requests are for permissible uses."[72]

The Tenth and Seventh circuits also concluded that unlike the statutes in *New York* and *Printz,* the DPPA does not affect any unique government function, such as the state legislative process or state law enforcement activities. Wrote the Tenth Circuit Court of Appeals: "The dissemination of personal information into the stream of commerce can in no sense be considered uniquely governmental. The DPPA neither limits a state's ability to regulate in the field of automobile licensing and registration, an exercise traditionally left to the states, nor restricts a state's ability to use motor vehicle information in its own regulatory activities."[73] The Seventh Circuit Court of Appeals noted: "Nothing in the Driver's Privacy Protection Act interferes with states' ability to license drivers and remove dangerous ones from the road; it regulates external rather than internal uses of the information."[74]

Instead of *New York* and *Printz,* the three courts relied to varying degrees upon *Baker*[75] to conclude that in the DPPA, Congress was only forcing states engaging in a certain activity to take administrative or legislative actions to comply with federal standards. The Tenth Circuit Court of Appeals, for example, viewed the Supreme Court's decision in *Baker* as rejecting "the notion that the federal government may never force a state wishing to engage in certain activity to take administrative or legislative actions to comply with federal standards. In fact, the Court referred to federal regulation of state activity as 'a commonplace that presents no constitutional defect.' "[76] In enacting the DPPA, the Tenth Circuit concluded, Congress had permissibly used its preemptive power under the Commerce Clause to curtail to some extent states' prerogative to make choices about the disclosure of motor vehicle information. "The DPPA simply requires states to make a choice, i.e. stop releasing personal information from state motor vehicle records to the public, or release such information consistent with the dictates of the DPPA."[77] The Tenth Circuit Court of Appeals also noted, as had Judge De Ment of Alabama had done nine months earlier, that while it was "cognizant of the Supreme Court's trend established by *New York* and *Printz* of striking down federal legislation which 'commandeers' state legislative and administrative processes, the Court has yet to hold that federal law, which directly regulates state activity and necessitates some state legislative or administrative action to achieve compliance, amounts to unconstitutional 'commandeering.' "[78]

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[71] 998 F. Supp. at 1329.

[72] 12 F. Supp.2d at 930.

[73] 161 F.3d at 1272.

[74] 163 F.3d at 1003.

[75] 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988).

Judge Crabb in Wisconsin had distinguished *Baker* because the bond requirement at issue in that case applied generally to any state, federal or private entity that issued bonds.[79] The Seventh Circuit Court of Appeals, though, noted that Congress had actually employed a different statute to require private borrowers to use registered bonds. "If one statute addressed only to states passes muster when other laws place private parties under equivalent obligations, why not the Driver's Privacy Protection Act?"[80]

The federal government also has argued that the Driver's Privacy Protection Act is permissible under congressional Commerce Clause power to regulate interstate commerce in personal information. Thus, the DPPA would be a generally applicable law being applied to states and other owners of such databases. Judge De Ment of Alabama agreed that the DPPA is permissible under the Commerce Clause because "Congress had a rational basis to conclude that States' disclosure of personal DMV records has a substantial, apparent effect on interstate commerce. . . ."[81] While considering the statute, Congress heard testimony that after being disclosed by states, driver's license information is often used in direct marketing campaigns or resold, and that direct marketing is a nationwide industry.[82] "Congress concluded that the very fact that such information is disclosed substantially impacts the national trade of DMV records," wrote Judge De Ment. "Hence, regulation of *all* States' disclosure of personal DMV records is necessary for the regulation of the interstate trade of such records."[83]

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[76] 161 F.3d at 1272 (*citing* 485 U.S. at 514-15).

[77] *Id.*

[78] 161 F.3d at 1272 (*see also*, 998 F. Supp. at 1330).

[79] 12 F. Supp.2d at 929.

[80] 163 F.3d at 1006.

The Eleventh Circuit, though noting "that it is abundantly clear that trafficking in data bases is an activity that substantially affects interstate commerce these days," disagreed with Judge De Ment because Congress had exempted from the DPPA "virtually all of its interstate connections."[84] Wrote Judge Hill for the Eleventh Circuit:

> In trying to protect legitimate governmental and business uses of such information, . . . , Congress riddled the Act with more holes than Swiss cheese. Through these holes escaped most of the interstate commerce activity covered by the Act. Thus, Congress claims its authority to regulate the States' dissemination of personal DMV information lies in its power to regulate the commercial aspect of this information which it then proceeded to exclude from the Act.[85]

The Seventh Circuit, in contrast, found that under the Commerce Clause, the DPPA constitutionally affected states as owners of databases of personal information. Although states are required to change their handling of requests for access to such driver's license data, the court concluded, the statute "affects states as owners of databases; it does not affect them in their role as governments."[86] The court said complying with the Driver's Privacy Protection Act is no different than if the states operated video rental stores and had to comply with the Video Privacy Protection Act.[87]

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[81] 998 F. Supp. at 1326.

[82] *Id.* at 1325-26.

[83] *Id.* at 1326.

[84] 171 F.3d at 1284.

[85] *Id.*

[86] 163 F.3d at 1004.

[87] 18 U.S.C. § 2710.

The court acknowledged that states could counter that they must license drivers and therefore cannot escape the DPPA as they could the Video Privacy Protection Act by staying out of the video rental business. The Seventh Circuit even acknowledged that "there is no equivalent private enterprise" in licensing drivers.[88] "Yet the activity under consideration is not licensing but disclosure. Wisconsin elected to reveal (often to sell) information from its drivers' database."[89] States then bear no greater burden than similarly-regulated private entities involved in the selling of personal information.

However, Judge Crabb in Wisconsin, whose ruling the Seventh Circuit Court of Appeals overturned, had rejected the federal government's assertion that the DPPA is an effort to generally regulate the market for information, saying the statute is aimed at "only a small, state-controlled facet of this market." The DPPA's "applicability to private parties is incidental to its foremost purpose: regulating the way in which states disseminate information."[90]

The Eleventh Circuit also rejected the federal government's contention that the DPPA is a generally applicable law when considered in the context of other federal laws such as the Video Privacy Protection Act that seek to regulate the dissemination of personal information. Wrote the Eleventh Circuit:

> Even if a statute could be considered generally applicable because it is part of some sort of scheme of regulation, Congress has thus far regulated the disclosure of personal information by holders of databases only in a piecemeal fashion. There is no generally applicable Congressional regulation of the disclosure of personal information even if all such laws are considered part of such a scheme. Thus, there is no generally applicable Congressional regulation of this activity on which the DPPA is a part.[91]

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[88] 163 F.3d at 1005.

[89] *Id.* at 1004.

[90] 12 F. Supp.2d at 929-30.

[91] 171 F.3d at 128 n.7.

III. PRIVACY

The federal government has argued in court that even if the Driver's Privacy Protection Act "runs afoul of the Tenth amendment,"[92] a right of privacy in the nondisclosure of confidential information under the Fourteenth Amendment gave Congress the authority to pass the statute.[93] The federal government relied primarily upon *Whalen v. Roe*[94] to contend that the Fourteenth Amendment protects the right to privacy by prohibiting states from disclosing "personal information" contained in motor vehicle records.

In *Whalen*, the Supreme Court recognized that while "there is no general constitutional right to privacy,"[95] the "cases sometimes characterized as protecting 'privacy'" had involved two kinds of interests, one of which was "the individual interest in avoiding disclosure of personal matters."[96] In defining the privacy interest at stake, Justice Stevens also had relied upon a magazine article in which Professor Kurland noted that although the constitutional right of privacy remained largely undefined, it included "the right of an individual not to have his private affairs made public by the government."[97] Kurland acknowledged that the form and shape of this facet of privacy had not been fully ascertained. Justice Stevens also relied upon Justice Brandeis' dissent in *Olmstead v. United States*, in which Justice Brandeis characterized "the right to be let alone" as "the most valued by civilized men."[98]

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[92] *Id.* at 924.

[93] U.S. CONST. amend. XIV, § 1 (No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.); U.S. CONST. amend. XIV, § 5 (The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.).

[94] 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977) (upheld a New York statute creating a computer database of people receiving prescriptions for certain drugs because there was no indication that safeguards against public disclosure of the information were inadequate).

[95] *Id.* at 608.

[96] *Id.* at 598-99.

[97] *Id.* at 599 (*quoting* Kurland, *The Private I*, The University of Chicago Magazine 7,8 (Autumn 1976).

[98] 277 U.S. 438, 478 (1928).

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Justices Brennan and Stewart, in separate concurring opinions, debated whether a constitutional right to privacy would be violated by the release of the kind of information at issue in *Whalen*. Justice Brennan said, "Broad dissemination by state officials of such information . . . would clearly implicate constitutionally protected privacy rights, and would presumably be justified only by compelling state interests."[99] Justice Stewart concluded, though, there is no "general interest in freedom from disclosure of private information."[100]

Applying a Right of Privacy to the Driver's Privacy Protection Act. The four federal courts that examined the DPPA in light of this privacy claim each rejected the federal government's contention. First, three of the courts questioned whether a Constitutional right to privacy in the nondisclosure of personal information exists. District Judge Dennis W. Shedd of South Carolina called it "murky" at best.[101] Judge Crabb of Wisconsin observed that federal courts of appeals have disagreed over whether there is a right to privacy in the nondisclosure of private information held by the government.[102] The Fourth Circuit Court of Appeals said the "Supreme Court has limited the 'right to privacy' to matters of reproduction."[103]

All four courts agreed, though, that even assuming such a constitutional right exists, it does not pertain to the information targeted by the Driver's Privacy Protection Act because drivers have no reasonable expectation that such motor vehicle record data will be kept secret. Wrote the Fourth Circuit Court of Appeals: "Neither the Supreme Court nor this Court . . . has ever recognized a constitutional right to privacy with respect to the type of information found in motor vehicle records. Indeed, this is the very sort of information to which individuals do not have a reasonable expectation."[104] The court noted that the Supreme Court has said "pervasive schemes of regulation," like vehicle licensing, must "necessarily lead to reduced expectations of privacy."[105] The Fourth Circuit added that "there is a long history in the United States of treating motor vehicle records as public records" and that the Fourth Circuit itself had previously considered a person's name and home address as "a matter of public record in motor vehicle registration and licensing records."[106]

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[99] *Id.* at 606.

[100] *Id.* at 609.

[101] 972 F. Supp. at 989.

[102] 12 F. Supp.2d at 925.

[103] 155 F.3d at 464 (*citing* Skinner v. Oklahoma, 316 U.S. 535, 63 S.Ct. 1110, 86 L.Ed. 1655 (1942); Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); and Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978)).

[104] 155 F.3d at 464-65.

Judge Crabb said, "There is no constitutional right to privacy in the nondisclosure of this information because there is no legitimate expectation of confidentiality regarding it."[107] While Judge Shedd concluded that while some of the information shielded from disclosure "may be considered 'personal' in a general sense," he could not find that the data was entitled to privacy protection under the Constitution. Name, driver identification number, address, phone number, and photograph "are clearly not the type of intimate matters for which individuals have a 'reasonable expectation of confidentiality' that the Constitution protects," he wrote.[108] The Eleventh Circuit Court of Appeals said drivers do "not have a reasonable expectation of privacy that the information is confidential" because information in motor vehicle records is not "intimate personal information given to a state official in confidence."[109]

The Fourth Circuit Court of Appeals and Judge Crabb concluded that the privacy claim is reduced because "the same type of information is available from numerous other sources."[110] Wrote Judge Crabb, "One's name, address and telephone number are available to anyone with a phone book."[111] Judge Shedd, meanwhile, concluded that the phrase "medical or disability information" used in the statute was "so broad that it

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[105] *Id.* at 465 (*citing* California v. Carney, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985)).

[106] *Id.* at 465 (*quoting* United States Dept. of Health & Human Services v. FLRA, 833 F.2d 1129, 1135 n.8 (4th Cir. 1987)).

[107] 12 F. Supp.2d at 925.

[108] 972 F. Supp. at 991.

[109] 171 F.3d at 1288 n. 10.

[110] 155 F.3d at 465.

[111] 12 F. Supp.2d at 925.

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encompasses a seemingly infinite set of information, only some of which is in fact entitled to privacy protection."[112] For example, wearing eyeglasses or using a wheelchair are obvious to anyone who sees the individual and, therefore, are not intimate personal matters. He said he had no basis in the record to establish which medical or disability information would be entitled to constitutional protection.

The Fourth Circuit Court of Appeals and Judge Crabb also discounted the privacy claim because license information is commonly provided by drivers to third parties. "For instance, a State-issued driver's license is often needed to cash a check, use a credit card, board an airplane, or purchase alcohol," said the Fourth Circuit. "We seriously doubt that an individual has a constitutional right to privacy in information routinely shared with strangers."[113]

In her opinion, Judge Crabb took a parting shot at the purported core purpose of the Driver's Privacy Protection Act, saying it is doubtful the statute would ever safeguard anyone's privacy. "The act is riddled with exceptions that any determined, resourceful person could exploit, particularly since there are no standards for verifying the truth or accuracy of claims made by individuals requesting information."[114]

IV. FIRST AMENDMENT RIGHT OF ACCESS

Only one of the seven federal courts to examine the Driver's Privacy Protection Act has ruled on whether a First Amendment right of access to government records limits congressional authority to restrict disclosure of DMV records to the general public. The Seventh Circuit Court of Appeals said the statute, on its face, does not violate such a right, even if such a right exists. "[T]he first amendment differs from the Freedom of Information Act," said the court. "Peering into public records is not part of the 'freedom of speech' that the first amendment protects."[115]

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[112] 972 F. Supp. at 991-92.

[113] 155 F.3d at 465. *See also*, 12 F. Supp.2d at 925, which states, "Driver identification and social security numbers are disclosed regularly when cashing a check, applying for credit or in any situation in which an individual must produce a driver's license."

[114] 12 F. Supp.2d at 925.

[115] 163 F.3d at 1007.

In *Houchins v. KQED, Inc.*, the Supreme Court had stated, "There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy."[116] Two years later, though, the Court did recognize a First Amendment right to attend criminal trials.[117] In *Richmond Newspapers v. Virginia*, the Court established two "helpful principles"[118] in deciding whether a judicial proceeding or record is subject to a qualified First Amendment right of access: (1) whether the information historically has been accessible to the public, and (2) whether access is of importance to the process of government.

The Seventh Circuit Court of Appeals, however, said the decision in *Richmond Newspapers* means only "that we cannot exclude the possibility that some particular record in a drivers-license system may in the future be deemed constitutionally exempt from the Act. . . ."[119]

V. CONCLUSION

Eight federal courts have examined the constitutionality of the Driver's Privacy Protection Act. While the conflict between individual informational privacy and public access to millions of government records is at the heart of the statute, its fate more likely depends upon how courts resolve a conflict between the Commerce Clause and Tenth Amendment. Does Congress have authority under the Commerce Clause to override the state FOI laws in order to restrict disclosure of driver's licenses? Five courts have said no, declaring the Driver's Privacy Protection Act an unconstitutional requirement that states actively administer a federal regulatory program. Congress exceeded its Commerce Clause authority and violated the Tenth Amendment by commandeering states' legislative processes and conscripting state officials for the purpose of implementing and enforcing federal regulations. Three courts, however, have ruled that in enacting the statute, Congress was constitutionally directly regulating a state activity by setting a federal standard that simply requires states to passively withhold information. Congress neither commandeered states' legislative processes by requiring them to enact statutes regulating the disclosure of personal information regarding drivers nor conscripted state officials to enforce a federal law. Instead, these courts found that the DPPA involved the proper exercise of Commerce Clause power to set a generally applicable federal standard regulating interstate commerce and thus preempt contrary state legislation.

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[116] 438 U.S. 1, 14, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978).

[117] Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).

[118] *Id.* at 1848.

[119] 163 F.3d at 1007.

This research agrees with the five courts that have declared the Driver's Privacy Protection Act unconstitutional. It concludes that Congress clearly has not enacted a generally applicable law as described in *New York* and *Printz.* It has aimed the statute squarely at states. Contending, as the Seventh Circuit Court of Appeals did, that the statute becomes generally applicable because it regulates disclosure of information, not licensing of drivers, is a specious argument that overlooks the type of information being restricted. As the Seventh Circuit noted, no private entity creates and maintains driver's licenses. These records exist only because of a state activity; no analogous private activity exists for Congress to regulate.

Forty-two states had elected to make available to the public certain records created and maintained by them. Congress has commandeered that legislative and executive process by enacting a restriction on the disclosure of those state government records. By requiring state officials to create and maintain a non-disclosure system, Congress has unconstitutionally conscripted them for the purpose of implementing and enforcing a federal regulatory policy.

While the Tenth Amendment presents a strong barrier to Congress' attempt to restrict access to driver's licenses, the First Amendment offers a far weaker obstacle. The Supreme Court, though it has recognized a qualified First Amendment right of access judicial proceedings and documents, has never established such a right to inspect all government documents.

Upholding the Driver's Privacy Protection Act, however, creates a slippery slope, at the bottom of which Congress dictates the public availability of any state and local government documents that might be gleaned for personal information. Real estate records, voter registration records, property tax payments, and a host of other documents now commonly open to public inspection would come under the purview of Congress. Yet, Congress has assumed control of DMV records in the name of protecting the secrecy of information that four courts have agreed may be personal, but is not private. As those courts noted, such data is often readily observable, available in other sources, and commonly disclosed by drivers to strangers.

Like a carjacker in broad daylight, Congress unconstitutionally commandeered states' freedom of information policies when it enacted the Driver's Privacy Protection Act. Its weapon was a statutory $5,000-a-day fine for state agencies not in compliance. Its motive was a well-intended but misguided attempt to secret away information to which drivers have no reasonable expectation of privacy.

The Truth Hurts:
Intentional Infliction of Emotional Distress As a Cause of Action Against the Media

by

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Prepared for presentation to the
Law Division
at the annual convention of the
Association for Education in Journalism and Mass Communication
August 1999, New Orleans

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The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media

Television news magazine "Prime Time Live" sent an undercover reporter to investigate a business offering psychic advice to the public via a "900" telephone number. ABC hid cameras and secretly recorded workplace activities and conversations, then aired the footage in an episode called "Hello, Telepsychic." Before long, the television network found itself saying hello to a jury, which awarded damages to two employees of the psychic-by-phone business.[1]

The telepsychics succeeded on a claim of intentional infliction of emotional distress. Although jury awards in such cases are still a rarity, claims of intentional infliction against the media are not. The number of published opinions in state and federal courts in just the past few years equals the number filed from the beginning of the century to the mid-1980s, when the last scholarly article on the topic was published.[2] In roughly one out of seven of the recent cases, plaintiffs have cleared the summary judgment hurdle. Intentional infliction is an active area of the law, and some plaintiffs have found a sympathetic ear in court.

It is an active area of the law because those who wish to sue the media see other legal avenues becoming dead ends. With broad definitions of newsworthiness and courts' reluctance to second-guess editors as to what is or is not of public interest, it has become extremely difficult for anyone to win an invasion of privacy lawsuit against the media, except for appropriation.[3] Similarly, the broad constitutional protections available in the area of libel law make it hard for plaintiffs to win.[4] But the intentional infliction tort does not contain any sort of "newsworthiness" or "public interest" defense, largely, of course, because it was not developed and conceived of as a publication tort.

Dicta in judicial opinions yield clues as to why plaintiffs are finding a sympathetic ear in court. When plaintiffs were allowed to proceed with their claims, it was in cases where the court portrayed the media as profit-hungry providers of entertainment or other content totally devoid of public interest. They were neither gathering nor disseminating news. First Amendment protections for newsgathering are limited, but they are nonexistent for the gathering of material for the "voyeuristic titillation" of the viewing audience, as one court put it.[5] In other words, the media had strayed from their traditional role as informers of the electorate — the role that is at the core of First Amendment protections.[6] Media critics have observed a recent transformation of news into entertainment[7] and have decried increasingly intrusive newsgathering techniques, but the media have ignored these complaints. Claims of intentional infliction may force them to listen.

This paper will begin by briefly tracing the history of the tort of intentional infliction and discussing its central elements. Next, it will examine claims of intentional infliction against the media decided over the past 10 years. This examination includes analysis of the reasoning courts have used in these cases, as well as generalizations about plaintiffs and their reasons for filing suit. Having shown who is likely to file suit, the typical circumstances for a suit, and the probable court response, it concludes with recommendations to help news organizations to avoid such claims and to help courts reduce the number of claims litigated.

A BRIEF HISTORY OF THE TORT

Academics, rather than courts, were the driving force in the development of the tort of intentional infliction.[8] According to the 1934 *Restatement of the Law of Torts*, recovery was not permitted for emotional injury, even when intentionally inflicted, if the defendant's conduct did not otherwise amount to a tort. Intentional infliction was introduced in law reviews in the 1930s and 1940s. The most influential of these was Calvert Magruder's 1936 article in *Harvard Law Review*.[9] He began by noting that "the common law has been reluctant to recognize the interest in one's peace of mind as deserving of general and independent legal protection, even as against intentional invasions."[10] But in the course of the article, he showed that legal protection for mental and emotional tranquillity, as it was called, had begun to develop. He predicted the emergence of a broad principle to govern these cases; it would hold liable someone who, without just cause or excuse, and beyond all bounds of decency, purposely caused a severe disturbance to another's emotional tranquillity. As will be shown later in this paper, a four-part test for intentional infliction has, in fact, emerged in the years since Magruder's article was published.

Intentional infliction was defined by the American Law Institute in its *Restatements* beginning in 1948.[11] California became, in 1952, the first state to recognize intentional infliction as a freestanding cause of action; now most jurisdictions recognize it as such.[12] But it is not a settled area of the law: The *Restatement* notes that the law of intentional infliction is still being developed, and that the limits of the tort have yet to be determined.[13] Despite the unsettled nature of this area of the law, it has attracted little scholarly interest.[14] A comprehensive analysis of the tort, by Daniel Givelber, was published in 1982, in which he found that the doctrine could not be consistently defined. "The tort," Givelber wrote, "provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized."[15]

Observers have noted that the protection offered by the tort of intentional infliction can open the door to litigation over trivialities and bad manners.[16] But, according to Givelber, it has provided justice in specific cases. It has been used successfully to counter the more outrageous high-pressure methods of collection agencies and other creditors; the bullying tactics of insurance adjusters seeking to force a settlement; and the harassment meted out by landlords seeking to evict unwanted tenants.[17] "The doctrine has typically been invoked," Givelber wrote, "and is likely to continue to be invoked, on behalf of the noninstitutional, nonprofessional party to a variety of significant economic and commercial relations. ... Although there is little evidence that this tort will ever provide the basis for principled adjudication, it has provided and probably will continue to provide the basis for achieving situational justice."[18] Anyone concerned about First Amendment freedoms can quickly see that this tort, with its lack of definition, can pose a threat to news outlets, given that they must report on the disturbing and controversial issues of the day.

Givelber did not discuss intentional infliction as a cause of action against the media, but Robert E. Drechsel did in a 1985 study in which he discerned four categories of cases based on journalistic content.[19] They were (1) thoughtless reports, such as identification of a rape victim during public court proceedings; (2) accurate reports that are likely to be upsetting to the individuals discussed in them, such as a report of a person's death from a drug overdose; (3) reports that subject people to fear of physical harm, such as reporting the name and address of a witness to a crime while the suspect was still at large; and (4) reports that are inaccurate and seemingly harmless, but upsetting to the individual discussed in them, such as a photograph that makes the subject look overweight. "A thread common to all four of these categories is an attempt to use the courts to legally punish what until recently might merely have been considered unfortunate breaches of journalistic ethics," Drechsel observed. "Inaccurate, insensitive, knee-jerk reporting has long been a concern of the journalism profession itself." News organizations evidently did not heed Drechsel's words, because the types of content that gave rise to the suits discussed in his paper have continued to prompt legal action. However, in the years since Drechsel's study, plaintiffs have accused the media of a new form of intentional infliction: newsgathering conduct that they perceive as outrageous. This moves the dispute outside the well-established legal protections for the content of news reports and into the much more limited realm of protections for newsgathering. These plaintiffs have had some success, albeit limited, in the courts.

The U.S. Supreme Court in 1987 addressed a claim of intentional infliction of emotional distress prompted by media content. But that decision, *Hustler Magazine v. Falwell*,[20] was decided on narrow grounds, and left many avenues open for claims against the media. This is the case in which nationally known minister Jerry Falwell objected to an ad parody published in the well-known skin magazine *Hustler*. The parody indicated that Falwell had "a drunken incestuous rendezvous with his mother in an outhouse." In small type at the bottom of the page was the disclaimer, "ad parody — not to be taken seriously. The magazine's table of contents also listed the ad as "Fiction; Ad and Personality Parody."[21] Writing for the Court, Chief Justice Rehnquist framed the issue very narrowly:

> This case presents us with a novel question involving First Amendment limitations upon a State's authority to protect its citizens from the intentional infliction of emotional distress. We must decide whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most.[22]

Rehnquist thus limited the analysis to a specific situation: a public figure claiming intentional infliction on the basis of an ad parody, that is, a particular type of media content. The Court then rejected Falwell's claim that, because the message was intended to inflict emotional distress, was outrageous and did in fact cause emotional distress, it was of no constitutional significance whether the message was fact or opinion, true or false. Rather, the First Amendment prohibited such a conclusion in the area of public debate about public figures. The Court was careful to limit its ruling to "the publication of a caricature such as the ad parody here," noting that a decision in favor of the defendant would subject political cartoonists and satirists to damage awards without any showing that their work falsely defamed it subject.[23] It ultimately held that "public figures may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with actual malice."[24] Because of the narrow grounds on which it was decided, *Hustler v. Falwell* was seldom mentioned in the cases identified for this study.

CENTRAL ELEMENTS OF INTENTIONAL INFLICTION

The *Restatement (Second) of Torts* provides this basic statement of the tort's requirements: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."[25] As applied by the courts, it consists of four elements: (1) the defendant's conduct was intentional or reckless; (2) the conduct must be outrageous and intolerable; (3) the defendant's conduct must cause the plaintiff emotional distress; and (4) the distress must be severe. Outrageousness is defined in the *Restatement* as conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'"[26]

The earliest indications of a separate cause of action for anything like intentional infliction were in cases holding a common carrier liable for insulting a passenger. Indeed, a line of cases deals with recovery for insult and indignity. However, Prosser and Keeton have noted that "Liability of course cannot be extended to every trivial indignity." They go on to say:

> There is still, in this country at least, such a thing as liberty to express an unflattering opinion of another, however wounding it may be to the other's feelings; and in the interest not only of freedom of speech but also of avoidance of other more dangerous conduct, it is still very desirable that some safety valve be left through which irascible tempers may blow off relatively harmless steam.
>
> There is the further, and still more significant, evident and serious danger of fictitious claims and vexatious suits in such cases.[27]

This study will show that, although freedom of speech is generally protected in intentional infliction suits against the media, the danger of vexatious suits that Prosser and Keeton warn about has been realized.[28]

One of the most notorious recent claims of intentional infliction against a non-media defendant was Paula Jones' sexual harassment case against President Clinton for events that allegedly occurred when he was governor of Arkansas and she was a state employee there.[29] Intentional infliction was one of several causes of action in the suit; all were unsuccessful. The court said that while the sexual encounter Ms. Jones described might be considered "odious," it did not meet Arkansas' standard for establishing outrage.[30] In intentional infliction cases involving the media, the courts often made similar rulings. They acknowledged that the behavior at issue was indeed odious, but not outrageous as a matter of law. As Givelber observed, intentional infliction differs from most traditional intentional torts in one key way: It provides no clear definition of the prohibited conduct. The term "outrageous" represents an evaluation of behavior and thus fails to offer clear guidance to actors and judges. This lack of definition will become apparent in the review of cases below. In the vast majority, courts decided that no outrageous conduct took place. And in the few instances in which courts said outrageous conduct may have taken place, they provided no definition, test or criteria that would give the law in this area more predictability.

COURTS RECKON WITH INTENTIONAL INFLICTION AND MEDIA DEFENDANTS

The rest of this paper is devoted to the discussion of intentional infliction claims against media defendants only. It is a practical necessity to limit the number of cases considered, so the study is restricted to decisions published from 1990 to the present (a total of 57 cases),[31] with an emphasis on the past five years. This section critically analyzes the reasoning courts used when deciding claims of intentional infliction against the media, in an effort to determine whether they are appropriately balancing the media's interest in free expression and the plaintiff's interest in not being harmed by media messages. The nine recent cases in which plaintiffs managed to clear the summary judgment hurdle are discussed first, because this admittedly limited success is a new development.

A Sympathetic Ear for the Plaintiff

Newsgathering. Four of the nine cases in which plaintiffs cleared the summary judgment hurdle stemmed from the newsgathering behavior of television journalists rather than from the content of a media report. In deciding these four cases, the courts applied the four-pronged test for intentional infliction set forth in the *Restatement*, which is commonly used for non-media cases, and found that the newsgathering behavior at issue could be construed as outrageous. The outrageousness prong has been the stumbling block for most intentional infliction claims against the media.[32] But most claims have been based on the content of the report, not on newsgathering behavior, and courts have been reluctant to label media content outrageous, even when they have not explicitly discussed First Amendment issues. In contrast, the media are on more dangerous turf in claims about newsgathering, because the First Amendment provides only limited protection for such activity.[33]

One of the four newsgathering cases led to the U.S. Supreme Court's recent decision in *Wilson v. Layne*. This decision may make it easier for plaintiffs to proceed with intentional infliction claims in some cases, even though it did not explicitly consider this issue.[34] The Court in *Wilson* held that a media "ride-along" in the home violates the Fourth Amendment. Lower courts dealing with claims of intentional infliction stemming from ride-along reporting based their decisions on whether such newsgathering was tortious, and were divided on the issue. The Court's ruling that these ride-alongs violate the Fourth Amendment removes another hurdle for plaintiffs.

The background to *Wilson* is extensive and not entirely relevant to this discussion of intentional infliction. The following discussion focuses on the most pertinent facts and issues from this extensive background: The U.S. Fish and Wildlife Service investigated in 1993 allegations that rancher Paul W. Berger poisoned and shot eagles, a protected species. The wildlife service obtained a search warrant for the Berger ranch and, in an effort to publicize its efforts to combat environmental crime, entered a written agreement with CNN to allow journalists to accompany the agents who executed the warrant. The agent who approached Berger's home was wired with a hidden CNN microphone that transmitted live audio to the CNN technical crew. CNN later broadcast a news story about ranchers killing predators, which included footage and sound recordings made in the house. Berger, who did not know the agent was "wired," filed a suit, *Berger v. Hanlon*, claiming intentional infliction, as well as violation of his Fourth Amendment right against unreasonable search and seizure.[35] The district court ruled that Berger did not have a Fourth Amendment claim and granted summary judgment for CNN. Then, relying heavily on the fact that no tortious conduct had occurred, the district court also granted CNN summary judgment on the intentional infliction claim.

But Berger appealed and the Ninth Circuit reversed on both these claims.[36] It held that a search videotaped by commercial television cameras was indeed unreasonable and the officers unprotected by qualified immunity. In dicta, the court repeatedly referred to CNN's work product as "commercial programming,"[37] "television entertainment"[38] and "commercial television"[39] — an apparent effort to distinguish it from legitimate news dissemination that might be worthy of some First Amendment protection. The Ninth Circuit remanded the intentional infliction claim to the district court for reconsideration. The defendant agent petitioned the U.S. Supreme Court for a writ of certiorari.

Separately, the Fourth Circuit considered another ride-along reporting case, *Wilson v. Layne*, and concluded that the officers involved had *not* violated an individual's Fourth Amendment rights by allowing the media to accompany them in the execution of an arrest warrant. The plaintiff petitioned the U.S. Supreme Court for a writ of certiorari. The Court consolidated the two cases and granted certiorari, noting the split between the circuit courts.[40] It limited its review to official rather than media liability issues, and held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."[41] In light of this decision, appellants Berger and Wilson have stronger arguments for their intentional infliction claims.

Kersis v. Capital Cities/ABC Inc.,[42] decided in 1994 by a California Superior Court, is the case that resulted in a jury award for the plaintiffs. ABC news magazine "Prime Time Live" sent reporter Stacy Lescht undercover to investigate Psychic Marketing Group, which offered psychic advice to the public via a "900" telephone number. ABC hid cameras at the business premises to secretly record workplace activities and conversations. These cameras were trained from time to time on plaintiffs Naras F. Kersis and Mark Sanders, who worked as telephone counselors for Psychic Marketing. "Prime Time" broadcast an episode titled, "Hello, Telepsychic," which included some of this footage. The plaintiffs filed suit in Los Angeles County Superior Court, alleging intentional infliction, among other claims. ABC moved for summary judgment, but the court declined. Critical to the court's decision on the intentional infliction claim was California's anti-eavesdropping statute. In this statute, the "Legislature made an exception for law enforcement agencies in using concealed electronic recording devices, but chose not to make one for the media," the court noted.[43] A trier of fact, the court said, could properly determine that the California Penal Code defines the outer "bounds of that usually tolerated in a civilized society."[44] The court issued its decision in *Kersis* in April 1994. In July 1994, a jury awarded Kersis $225,000 in compensatory damages and $225,000 in punitive damages. Plaintiff Sanders was awarded $335,000 in compensatory damages and $300,000 in punitive damages. In addition, $678 in punitive damages were assessed against defendant Lesch, the reporter, and $1,800 against the man who posed as her boyfriend on the assignment.

KOVR-TV Inc. v. Superior Court (Whittle),[45] decided in 1995 by a California appellate court, also involved a television journalist entering private property, but this time without law officers. In this case, a woman murdered her two children, ages 6 and 3, and then committed suicide. Reporter Mark Saxenmeyer of KOVR-TV and a cameraman arrived on the doorstep of the dead woman's neighbor. In the neighbor's home were three children, ages 11, 7 and 5, but no adults. With "cameras rolling," Saxenmeyer asked the children what had happened next door — even though he knew the children were unaware of the deaths and not accompanied by an adult. Saxenmeyer then told the children about the deaths "in such a manner as to cause the children emotional distress so that their visible emotional distress would be demonstrative to the TV audience."[46] A count of intentional infliction of emotional distress, among other claims, was filed on behalf of three children.

KOVR-TV did not contest that the children suffered severe emotional distress; rather, it claimed that reporter Saxenmeyer's disclosures to the children about the murders and suicide next door did not constitute extreme and outrageous conduct. The court disagreed. "The videotape reveals an uninvited intrusive encounter by adult strangers with children of tender years not in a public place but in their home," the court stated.[47] Nor was it swayed by the fact that the videotape was never broadcast. "The issue here is whether defendants have negatived [sic] any reasonable inference that Saxenmeyer's conduct was deliberately calculated or, or recklessly undertaken, to elicit a 'newsworthy' reaction, and if so whether such conduct exceeds the bounds tolerated by civilized society. ... [T]he videotape interview is reasonably susceptible to such an inference."[48]

The court rejected KOVR-TV's argument that liability based on Saxenmeyer's conduct in the videotape infringed on First Amendment freedoms. Relying on *Florida Star v. BJF*,[49] the television station said it was simply "relaying truthful information" and that any sanction would be inimical to a free press. But the court emphasized that the press must conform to the same laws as everyone else. It began by citing *Associated Press v. National Labor Relations Board*,[50] in which the Court stated that a reporter "has no special privilege to invade the rights and liberties of others." Then it cited a California case: "First Amendment decisions 'do not stand for the proposition that the press and its representatives are immune from liability for crimes and torts committed in news gathering activities simply because the ultimate goal is to obtain publishable material.'"[51] The court repeatedly referred to the young age and vulnerability of the children involved in the KOVR-TV dispute:

> If indeed defendant sought to elicit an emotional reaction from the minors for the voyeuristic titillation of KOVR-TV's viewing audience, this is shameless exploitation of defenseless children, pure and simple, not the gathering of news which the public has a right to know. A free press is not threatened by requiring its agents to operate within the bounds of basic decency.[52]

Clearly the court in KOVR-TV had no doubt that the station's reporter had crossed this boundary. And as with the torts of trespass and intrusion, it did not matter that the videotape in question was never broadcast. It was the newsgathering behavior, not the news report itself, that caused the offense. The court also was careful distinguish KOVR-TV's activities from the gathering and dissemination of news about a matter of public concern.

Baugh v. CBS Inc.,[53] decided in by a federal district court in California in 1993, stemmed from another "ride-along" reporting incident. A CBS news correspondent accompanied a social worker who was part of a Mobile Crisis Intervention Team, a team that provided emergency assistance to crime victims. CBS filmed several of the social worker's encounters with victims, including Yolanda Baugh, who had been beaten by her husband. The social worker visited Baugh shortly after the assault, and Baugh allowed the social worker into her home, along with the CBS camera crew. CBS later aired a segment about the social worker's efforts on its news magazine, "Street Stories." Footage of the social worker's encounter with Baugh was included. Baugh filed suit on several grounds, including intentional infliction. She alleged that CBS personnel entered her home and misrepresented themselves to gain her consent to videotaping. (She had mistaken the camera crew for law enforcement officials and thought the film would not be used for "commercial purposes."[54]) CBS must have known that, as an assault victim, she was vulnerable, and it took advantage of her, she said. The court agreed with

Baugh and refused to grant CBS' motion for summary judgment on the intentional infliction claim. "At this stage of the proceedings, the Court cannot say that Defendants' behavior was not outrageous as a matter of law."[55]

In its analysis of the intentional infliction claim, the court made no mention of First Amendment concerns. It did, however, raise them in its analysis of Baugh's claim of appropriation. Baugh alleged that because the "Street Stories" episode was "patently false, misleading and sensationalized,"[56] CBS forfeited any privilege provided for news accounts. The court disagreed, indicating that even news programs must keep up with changing tastes and interests:

> In the age of 'channel-surfing,' news organizations are hard-pressed to disseminate information in a manner that will capture the viewers attention. "Street Stories" is simply one attempt at presenting news in a more compelling fashion. Subjecting news organizations to a jury trial every time they develop a new program format and style would place an unreasonable burden on the exercise of free speech.[57]

The court in *Baugh* explicitly described "Street Stories" as a news program, which made it worthy of First Amendment protection with regard to causes of action focused on the content of the report. But Baugh was allowed to proceed with her claim based on CBS' allegedly intrusive newsgathering techniques.

These four cases show that when a claim of intentional infliction stems from newsgathering behavior, courts have been open to the possibility that the behavior could be deemed outrageous as a matter of law. Newsgathering practices such as ride-along reporting, undercover reporting and the use of hidden cameras have drawn public criticism, but that has not stopped the media from using them. Plaintiffs claiming intentional infliction stemming from newsgathering behavior have found another way to communicate their displeasure with media, and courts have had a sympathetic ear. Newsgathering has only limited protection under the First Amendment, and this protection has been linked to the press' role of informing the public in a democracy.[58] The courts in *Berger* and *KOVR-TV* emphasized the commercial and entertainment interests of the media, rather than this critical societal role. Without First Amendment protection, the media are left vulnerable to claims of intentional infliction based on newsgathering practices.

Content. The remaining five of the nine intentional infliction claims in which plaintiffs cleared the summary judgment hurdle were based on the content of a media message. Three arose from comments by radio show hosts, one from a tabloid newspaper story, and one from a magazine article. Berated brides filed two of the three radio-related claims. It is not uncommon for talk radio broadcasters, seeking a few laughs, to pan the photographs of brides who appear in newspaper wedding announcements. Neither the brides nor the courts are laughing. In *Esposito-Hilder v. SFX Broadcasting Inc.*,[59] decided in 1997, Annette Esposito-Hilder was the target of disparaging comments in a routine known as the "Ugliest Bride" contest. In *Murray v. Schlosser*,[60] decided in 1990, Cynthia F. Murray was selected as "dog of the week" and won a prize consisting of a case of Ken-L-Ration and a dog collar. In both, the court denied the media defendant's motion to dismiss the claim of intentional infliction, noting a lack of public interest in the subject matter. The court in *Esposito-Hilder* acknowledged the First Amendment implications of its decision, but noted that the plaintiff was a private figure, that the broadcasting medium has the most limited First Amendment. It also noted that the parties in the suit were business competitors in the radio broadcast industry.[61] In *Murray*, the defendant cited the First Amendment and said the broadcast was protected opinion,[62] but the court disagreed. "The sole alleged context of the defendants' program was to ridicule someone for the purported amusement of their audience."[63]

Kolegas v. Heftel Broadcasting Corp. arose from radio show hosts' comments about a man whose wife had neurofibromatosis, commonly known as Elephant Man disease. Anthony Kolegas had paid radio station WLUP to promote a cartoon festival to benefit neurofibromatosis, commonly known as Elephant Man disease. Kolegas phoned the station after it broadcast a festival advertisement to discuss the benefit further, and stated in an on-air conversation that his wife and son had the disease. At that point, the radio hosts hung up the phone. According to the complaint, one of the hosts stated, "Why would someone marry a woman if she had Elephant Man disease? It's not like he couldn't tell — unless it was a shotgun wedding."[64] Kolegas filed suit on several grounds, including intentional infliction. In allowing Kolegas to proceed with the intentional infliction claim, the Illinois Supreme Court made comments similar to those in *Murray*: "A radio talk show host's interest in ridiculing another for the purported amusement of the audience is not entitled to the same type of legal deference given to a creditor's legitimate interest in collecting a debt."[65]

Another content-based claim in which the plaintiff prevailed stemmed from a tabloid newspaper story headlined, "World's oldest newspaper carrier, 101, quits because she's pregnant!" The article was about Nellie Mitchell, the 96-year-old operator of a newsstand in a small Ozark Mountain town in Arkansas. A jury found that the defendant newspaper's conduct amounted to intentional infliction of emotional distress, among other claims, and awarded her $650,000 in compensatory damages and $850,000 in punitive damages. A U.S. District Court let the jury award stand, stating: "Nellie Mitchell's experience could be likened to that of a person who had been dragged slowly through a pile of untreated sewage."[66] The front page containing Mitchell's photo included headlines such as "Road Kill Cannibal — He eats accident victims"; "20-Mile Ride with a Headless Ghost"; and "Farmer Becomes a Millionaire Making Whips for Wife Beaters." "The court concludes that reasonable jurors could find that it is 'worth' a great deal to suddenly find your likeness buried in the slime of which this publication was made," it wrote. The court in *People's Bank* had no doubt the newspaper had harmed Mitchell: "Defendant undoubtedly has the Constitutional right to publish 'newspaper stories,' 'literature,' 'fiction,' or whatever the articles ... are, but when it does and damages others by doing so, our system literally demands that the injured person be adequately compensated in an attempt to make them whole."[67]

It is probably safe to describe the media content at issue in the above four cases as tasteless and on the borderline of what can reasonably be called news. *Foretich v. Advance Magazine Publishers* was different in that it stemmed from *Glamour* magazine's coverage of a highly publicized dispute between Eric Foretich and Elizabeth Morgan, who went to jail rather than give her ex-husband custody of their young daughter.[68] Morgan's allegations against Foretich included a claim that he and his parents sexually abused their daughter. Foretich and his parents sued the magazine publisher, claiming intentional infliction, among other causes of action. The court invoked the First Amendment and dismissed two of the three plaintiffs' intentional infliction claims, as well as their defamation claims: "Libel law and the First Amendment would be completely subverted if emotional distress claims could be premised solely on a person's emotional reaction to a published statement concerning someone else."[69] It allowed Doris Foretich to proceed with her defamation claim and, in turn, her intentional infliction claim.

These cases show what can happen when the media stray from their job as government watchdog to dabble in entertainment or blatant competition with a commercial rival. The First Amendment protects news organizations when they are fulfilling their duty to democracy. When, however, media outlets engage in other activities, courts may be reluctant to recognize First Amendment protections.

When Media Defendants Prevail

The majority of intentional infliction cases identified for this study were decided in favor of the media defendant, but the media still have cause for concern. The sheer number of such claims increased dramatically in the 1990s, which means that the media were forced to mount frequent legal defenses. In deciding these cases, courts generally used one of three approaches. Most often, courts applied the four-part test put forth in the *Restatement*. In half the 57 cases identified for this study, courts applied this test and ruled that the behavior in dispute simply was not outrageous. In about one-fifth of the cases, courts cited First Amendment concerns, and generally ruled that the act of publishing the news, however shocking the report might be, does not constitute outrageous behavior. In most of the remaining cases, courts used a variation of the First Amendment rationale, stating that publication of a truthful report is not outrageous, but stopping short of invoking the First Amendment. A few opinions did not fit into any of these categories. A variety of media — television, radio, newspapers, books and magazines — are represented. News organizations large and small were defendants, from the *New York Times* and papers owned by Hearst and Gannett, to smaller publications such as Kentucky's *Manchester Enterprise*, a weekly with a circulation of 7,100.[70]

Four-Part Test: Behavior Not Outrageous

Twenty-seven cases were decided using this rationale. In all but three, the complaint focused on media content rather than on newsgathering behavior.[71] Even though these courts made no mention of the First Amendment in their reasoning, they nonetheless found no news content worthy of the description "outrageous" and therefore actionable under a claim of intentional infliction. While this may be good news for the media, it provides little guidance to either plaintiffs or defendants as to what *does* constitute outrageous behavior. At most, one can conclude that the publication of editorial content, no matter how intrusive into a person's private affairs, most likely will not be found outrageous as a matter of law, unless it pointedly ridicules an individual.

Newsgathering. Newsgathering behavior was at the crux of only three unsuccessful claims of intentional infliction; the rest dealt with media content. Two of the newsgathering cases are worth discussing in detail because they are apparently at odds with similar cases decided in favor of the plaintiff. This suggests that courts in different jurisdictions have been inconsistent in how they define outrageousness. *Reeves v. Fox Television,* [72] decided by a federal district court in Ohio in 1997, was a ride-along reporting case similar in several respects to *Baugh,* the case filed by the domestic abuse victim over the filming of her encounter with a victim's advocate. In *Reeves*, television journalists accompanied law-enforcement personnel on their official duties and entered the home of a man who had just been involved in an assault. But unlike *Baugh*, *Reeves* was decided in favor of the defendant television network. Willie Reeves Jr. sued Fox Television over the airing of footage of his arrest on the program "Cops." Cleveland police arrested Reeves at his home on an assault charge. When they arrived, he was in the shower after an "altercation with another man," he said.[73] The police were accompanied by a camera crew for "Cops," which videotaped the encounter. The program containing the segment was shown more than once on Fox.[74] Reeves claimed intentional infliction, as well as trespass and other causes of action. But the court analyzed Reeves' intentional infliction complaint primarily in terms of the material broadcast rather than in terms of the behavior of the camera crew. Although the crew got footage of Reeves while he was naked and while he was clad only in a towel, the court granted summary judgment to the defendants. It said their conduct in taping the arrest and airing it on "Cops" simply did not constitute "outrageous and extreme conduct, beyond all possible bounds of decency." The plaintiff was not shown naked on television, the court said, and the defendants

> merely videotaped the activities occurring in Plaintiff's dining room. The camera did not follow Plaintiff around his house. Indeed, during the "Cops" segment, Plaintiff is shown wearing a towel and sitting at a table, which covers most of Plaintiff, or being arrested and led out of his house, at which point he is fully dressed.[75]

A key difference between *Reeves* and *Baugh* — although not articulated by the courts — is that Reeves was an alleged assailant, while Baugh was an alleged victim, even though both were involved in violent episodes.[76] It is one way to explain why the court in *Reeves* was unfazed by a camera crew videotaping a towel-clad man being arrested in his own dining room, while the court in *Baugh* said a camera crew in the home of a battered wife would sustain a claim of intentional infliction. Consciously or not, the court in *Reeves* may have deemed the plaintiff less worthy of protection.[77]

In *Howell v. New York Post*,[78] even trespass was not enough to sustain a cause of action for intentional infliction. This contrasts with the ruling in *Kersis*, the psychic marketing case in which the court said that violation of the state penal code could be viewed as outrageous behavior.[79] Plaintiff Pamela Howell was a patient at a private psychiatric facility in suburban New York state. She said it was essential to her recovery that the hospitalization remain a secret from all but her immediate family. Hedda Nussbaum was also a patient at the hospital. Nussbaum was the adoptive mother of Lisa Steinberg, a 6 year old whose 1987 death from child abuse was widely publicized. In September 1988, a photographer from the *New York Post* trespassed onto the hospital's secluded grounds and, with a telephoto lens, took outdoor pictures of a group that included Nussbaum and the plaintiff. The next day, a picture of Nussbaum, walking next to the plaintiff, was published in the *Post*, accompanied by a story. Howell's name was not mentioned in the article, but her face was clearly discernible in the photo. She filed suit, claiming intentional infliction, among other causes of action.

In 1993, the New York Court of Appeals upheld a lower court's dismissal of the claim, stating two reasons. First, a newspaper's publication of a newsworthy photograph is privileged conduct that cannot be the basis for liability. The plaintiff failed to show that the privilege had been abused. Second, courts have recognized that newsgathering methods may be tortious such as in *Galella v. Onassis*.[80] Recovery may be available when a journalist's conduct is sufficiently atrocious to meet the requirements of intentional infliction. But the conduct of the *Post* photographer did not do so. "[A] trespass onto [the hospital's] grounds [...] does not remotely approach the required standard," the court stated. "That plaintiff was photographed outdoors and from a distance diminishes her claim even further."[81] The apparent inconsistent definitions of outrageous behavior in *Reeves* and *Baugh* and in *Howell* and *Kersis* give the law a lack of predictability that poses a threat to First Amendment freedoms. Media organizations cannot be sure what newsgathering behavior will be deemed outrageous as a matter of law.

Content. When an intentional infliction complaint focused on media content rather than newsgathering technique, courts generally were quick to decide in favor of the media, even when they did not mention the First Amendment.[82] The past 10 years of court decisions indicate that media content, no matter how controversial, will not be deemed outrageous as a matter of law, unless it pointedly ridicules an individual. However, no court made this ruling explicitly. As a result, plaintiffs are still using intentional infliction as a cause of action against the media, although they are highly unlikely to succeed. Media organizations must pay for legal defenses in these cases. The media's First Amendment freedoms would be better served by an explicit ruling that media content cannot form the basis for a claim of intentional infliction. That said, even the courts that left the First Amendment out of their intentional infliction analysis have, in the end, protected the media's freedom to publish. Even disclosure of information that exposed plaintiffs to the risk of bodily harm, as happened in *Sanchez Duran v. The Detroit News Inc.*[83] was not sufficient to sustain a claim of intentional infliction. This is remarkable in that such disclosure has been sufficient to sustain claims of negligence against the media.[84]

First Amendment Concerns

When courts dealt explicitly with First Amendment issues in intentional infliction claims — and the claim was based on content rather than newsgathering behavior — they nearly always ruled in favor of the media defendant.[85] These courts saw the intentional infliction claims as the plaintiff's attempt to circumvent First Amendment protections for media content and rejected them. The words of the California appeals court that decided *Foreman v. Lesher Communications*[86] in 1993 provide a good example of this reasoning:

> Where, as here, a plaintiff's right to recover requires a balancing of First Amendment interests against an individual's right to redress for injury resulting from a publication, [t]hat constitutional protection does not depend on the label given the stated cause of action [citation], and no cause of action can claim ... talismanic immunity from constitutional limitations.[87]

The Nevada court that decided *Chastain v. Valley Broadcasting Co.*[88] in 1996 indicated that the truth can sometimes hurt. The plaintiff was the father of a young woman who was found dead in the desert. The woman had been missing for two weeks, and the father first learned of her death from a television news broadcast. Applying the four-part test for intentional infliction, the court said the broadcaster's actions could not be viewed as intentional with regard to the plaintiff father. To decide otherwise, the court, said, would require the finding that every news broadcast is directed at every individual who chooses to watch it. "Creating such a broad class of potential plaintiffs ... cannot be reconciled with the First Amendment," the court stated.[89] It went on to quote another court:

> Doubtless many persons at such a time would be distressed or annoyed by a publication of the sort here involved. [...] The law does not provide a remedy for every annoyance that occurs in daily life. Many things which are distressing or may be lacking in propriety or good taste are not actionable.[90]

The courts that decided the cases discussed in the next section echoed this idea — the notion that news, by its very nature, can be distressing — but stopped short of explicitly mentioning the First Amendment.

Truthful Reports

In these nine decisions, courts stated that a truthful report cannot be considered outrageous as a matter of law.[91] The most succinct example of such reasoning was found in *Brown v. Hearst Corp.*, decided by the First Circuit of the U.S. Court of Appeals in 1995. American Airlines pilot Willis N. Brown of Newtown, CT, sued WCVB-TV in Boston after it broadcast a segment about his missing wife Regina, from whom he was separated. Six months before Regina's disappearance, the wife of a different pilot, who also lived in Newtown, had also disappeared. Fragments of her bones were found in a nearby river, and her husband was accused of murdering her and then using a woodchipper to dispose of her body. WCVB's segment about Regina Brown was titled, "The Other Pilot's Wife." The program described Mrs. Brown's disappearance as a mystery or, at worst, a possible unsolved murder. Brown sued on several grounds, including intentional infliction; the circuit court upheld the lower court's granting of summary judgment to the defendant news organization. It stated:

> In all events, many of the legitimate news stories that appear in the media involve foreseeable distress for the subject of the story, probably severe distress in some cases. Regina's disappearance and the divorce trial were news stories, and so was her continued absence and the failure of the police to solve the case. Willis provides no basis to think that generally accurate coverage in such a case is even remotely close to conduct "beyond all possible bounds of decency" and "utterly intolerable in a civilized community."[92]

Courts acknowledged that the truth will sometimes hurt, but said the press cannot be held liable for the pain caused by publication of a truthful article. One court said that media coverage of an official public event is not actionable as an outrage if it meets the requirements of the fair report privilege.[93]

Other rationales

Newsgathering practices and the content of the report were intertwined in an unusual suit, *Clift v. Narragansett Television*,[94] decided by the Rhode Island Supreme Court in 1996. It was brought by the widow of a man who fatally shot himself in the head after a television station aired his last words. The man, Bruce Clift, had locked himself in the house with guns and threatened to commit suicide. The police intervened and a local television station, Channel 12, appeared on the scene. A reporter from the station telephoned Bruce Clift and taped the interview. It was broadcast on the 6 p.m. news, and Bruce Clift was found dead shortly thereafter, with the televisions in his home switched on and tuned to Channel 12. His widow, Judith Clift, filed suit, alleging intentional infliction, among other causes of action. The court granted summary judgment for the television station on that count for a very specific reason: the plaintiff had failed to satisfy Rhode Island's unusual requirement for physical symptomatology.[95] However, it allowed the plaintiff to proceed with her claim of negligence, which also was based on the reporter's conduct.[96]

In sum, courts generally have been sensitive to the need to balance the media's interest in freedom of expression against the plaintiff's interest in not being harmed by media messages. When claims of intentional infliction stemmed from media content, courts almost always held that the message could not be deemed outrageous as a matter of law. In most of the content-based cases that courts allowed to proceed — the berated brides, the husband of the woman with Elephant Man's disease, the 101-year-old pregnant newspaper carrier — it is hard to defend the messages from a journalistic standpoint. They are arguable not even journalism and could easily have been avoided without compromising the media's First Amendment responsibilities and freedoms. When the court in *Foretich* allowed one claim of intentional infliction to go forward along with a claim of defamation, it wisely noted that the former tort could not be used as an end run around the latter.

Courts have been more willing to allow claims of intentional infliction to proceed when they are based on newsgathering practices. This should come as no surprise, given that newsgathering receives only limited protection under the First Amendment. However, in some of these cases, courts also have stated that the media were engaged in gathering entertainment material for commercial purposes, not in newsgathering. These cases deal with long-standing controversies over practices such as undercover reporting and the use of hidden cameras. News organizations might avoid some of these claims by thinking more about the ethicality of their newsgathering procedures. Whatever one thinks about the ruling in *KOVR-TV*, it is probably safe to say that reporter Saxenmeyer's behavior was crude and that the plaintiff sought to punish him for it.

The above analysis shows that claims have been filed against many media for many types of messages. While television news magazines and their aggressive reporting techniques attract a great deal of popular attention and have been among the defendants in intentional infliction claims, they did not constitute the majority of those defendants. Rather, newspaper articles were at issue in more than half the cases. Two books generated claims — one a work of fiction.[97] Despite the much-touted power and pervasiveness of television, the printed word evidently still packs a punch that can hurt feelings, even when it appears in a small-circulation semiweekly. News stories, news photos, columns, a letter to the editor, even a legal advertisement have all been at issue in these claims. On television, programs that gave rise to suits included news magazines, news shows, and hybrid programs, such as Fox Television's "Cops," that present public affairs material in an entertainment-style format. Radio talk shows were at issue in three of the suits, and the plaintiff was allowed to proceed in all three. Reporting practices that could be construed as intrusive or surreptitious sometimes led to legal action. Reporters who accompanied law enforcement officials onto private property were involved in three cases;[98] undercover reporters in two.[99] A reporter who entered a private home without explicit invitation was the target of one claim;[100] a photographer who trespassed onto private property and used a telephoto lens yet another.[101] In short, journalists who enter private property without explicit permission from the property owner may not be guilty of trespass, but are nonetheless targets of intentional infliction claims. Similarly, news stories that were based on recorded conversations gave rise to two suits,[102] even though in neither case were journalists accused of illegal wiretapping.

PLAINTIFFS: WHO CLAIMS INTENTIONAL INFLICTION AND WHY?

The media have prevailed in most of intentional infliction claims, but plaintiffs keep filing them. News organizations wishing to avoid intentional infliction claims have received no guidance from the courts, which have failed to provide a definition or test to determine outrageousness. This study, however, can help news organizations identify potential problems by revealing patterns among plaintiffs and the situations that gave rise to their claims. These are the situations in which it may be especially important to be sensitive to sources' concerns and the ethicality of news decisions.

Plaintiffs have tended to be people who would be considered private figures in libel suits. They are people not used to the glare of the media spotlight, who have found their personal lives exposed to the public, often when they are vulnerable from recent trauma. As will be shown below, victims of sexual assault and bereaved family members are well-represented among these plaintiffs. With regard to the situations that gave rise to suits, unsought publicity about topics that people have traditionally considered private, such as sexual orientation and psychiatric treatment, has been a trigger. So have imputations of criminal conduct and drug use — claims that could be considered defamatory. News organizations cannot avoid covering these issues, but they can try to be more sensitive in their coverage of them and in their dealings with the people involved. What Drechsel noted in 1985 is also true today: Intentional infliction claims often are attempts to use the courts to legally punish what previously would have been considered a breach of journalistic ethics. Some of these suits might be avoided if journalists were more compassionate with sources. A suicide or rape is not routine for the survivors or victim, even though such stories are the bread and butter of most news organizations.

Bereavement

Bereavement has been the backdrop for many claims of intentional infliction, including those against non-media defendants.[103] Seven of the cases identified for this study involved family members of a deceased person.[104] Three of the deaths were the result of suicide or suspected suicide.[105] Other sensitive issues were intertwined in the bereavement cases: unsought publicity about sexual orientation and an allegation of drug use. For example, the bereaved family of a Navy man sued NBC over its news coverage of the fatal 1989 explosion of the U.S.S. Iowa. [106] Their action for intentional infliction claimed that NBC accused sailor Clayton Hartwig of purposefully causing the Iowa explosion as a means of committing suicide and implied that Hartwig was homosexual. The court granted summary judgment to NBC, saying the plaintiffs did not show extreme and outrageous conduct by the broadcaster because NBC's news reporters had no malicious intent; in fact, they did not know the Hartwigs before the explosion.

Another case involving bereaved family members, suicide and unsought publicity about sexual orientation was *Hogan v. Hearst.*[107] Benny Hogan was charged with indecent exposure following an incident in a public park in San Antonio, Texas. About a month later, the *San Antonio Express-News* published an article about the various arrests the city police department had made at local parks, using its undercover operations to target sex offenders in city parks. A chart accompanying the article showed how many arrests on sexual activity charges occurred at each park, and a sidebar gave the names of suspects charged in the latest police roundup. Benny Hogan's name and date of birth were published; he committed suicide shortly after publication of the article. Benny Hogan's family filed suit against Hearst, the publisher of the newspaper, and the reporter who wrote the article, claiming that the deceased was a "closeted homosexual" and the paper printed private facts that essentially "outed" him against his wishes. The court granted summary judgment to the defendant newspaper on First Amendment grounds. It stated: "A defendant cannot be found liable when he has done no more than insist on his legal rights in a permissible way, even if he is aware that such insistence is certain to cause emotional distress."[108]

Sexual assault

Incidents of sexual assault were involved in four of the cases of intentional infliction identified for this study.[109] Two of the victims were young teenagers.[110] Plaintiffs' reasons for claiming intentional infliction varied: one said that a newspaper article about the incident identified her even though it did not give her name;[111] another said that the television station that broadcast the story should have known she was particularly vulnerable to emotional distress.[112] In *Sanchez v. Affiliated Publications,*[113] decided in 1993 by a Massachusetts Superior Court, the plaintiff claimed that a newspaper column forced her and her family to flee their home. *Boston Globe* columnist Mike Barnicle wrote about a 14-year-old girl's rape by a 16-year-old gang member. She subsequently gave birth, and she and her family claimed were subsequently harassed and intimidated by the gang. The plaintiffs did not claim the column was inaccurate, but that its publication forced them to vacate their apartment and move to a different part of Boston. They also alleged that the plaintiffs' mother pleaded with Barnicle not to publish the story. The court ruled that there can be no recovery for intentional infliction based on a truthful publication that is privileged and concerns a matter of legitimate public concern.

Sexual orientation

Unsought publicity about sexual orientation was involved in *Hartwig* and *Hogan*, discussed above. It also was at the heart of *Merriwether v. Shorr*,[114] decided in 1995 by a New York Supreme Court. A caption and photograph in a magazine gave rise to this suit. Valerie Merriwether and Rosetta Ford sued photographer Kathy Shorr and the publisher of *Popular Photographer* after it carried a picture captioned, "LESBIAN COUPLE ... two women on their way to a commitment ceremony in a church in Greenwich Village."[115] The photo showed Merriwether and Ford in their wedding attire in the back of a limousine driven by Shorr, who worked as a driver as well as a photographer. It was published six years after the ceremony, and the plaintiffs claimed it caused them embarrassment and distress because they had always been very private about their relationship. The court ruled that the defendant's conduct did not transcend all bounds of decency.

The remaining cases dealt with topics that are standard fare for most news organizations: drugs, crime, politics. News organizations will, in the course of their work, necessarily discuss issues that offend people's sensibilities. They cannot possibly discuss matters of public concern without doing so. To hold them liable for intentional infliction based on the content of a report would open the floodgates for lawsuits.[116] Indeed, some cases were based on weak complaints, suggesting that the plaintiffs were generally angry with the media and claimed intentional infliction as one of several causes of action — in hopes that one would stick. These are the vexatious suits about which Prosser and Keeton warned. Probably the weakest case reviewed for this study was *Williams v. Nathan*,[117] decided in 1993 by a federal district court in Virginia. James E. Williams sued the *Arlington Journal*, claiming intentional infliction, after it published a legal notice advertising a foreclosure sale of property he owned. The court dismissed the charge, simply stating that "none of the actions of the defendants rise to a level of outrageous or intolerable conduct." Clearly, this claim is so weak it should not even have reached the court. The *Arlington Journal* has a daily circulation of 7,500 and is owned by Journal Newspapers Inc., which owns several newspapers in Maryland and Virginia.[118] But until the courts rule that claims of intentional infliction based on the content of a report are not permissible on First Amendment grounds, the media can try to avoid these suits by thinking more about the ethicality of their work.

REDUCING CLAIMS OF INTENTIONAL INFLICTION AGAINST THE MEDIA

Intentional infliction claims against the media are growing as plaintiffs realize they are unlikely to win privacy or libel claims. This survey has shown that plaintiffs appear to be filing suit as a way to legally punish what previously would have been considered violations of journalistic ethics or examples of bad taste. One might anticipate that most cases stemmed from the acts of the stereotypic aggressive network television news reporter. Such was not the case. More than half involved newspapers, some of them quite small. This is very much an issue of hurt feelings; this was glaringly evident in the cases of the berated brides. People are angry at the media and seek retribution. Our legal system does not hold news organizations accountable when they hurt feelings, but the growth of these suits against the media shows that it is a significant concern for the public they serve. Although the media cannot and should not try to please everyone, they must pay attention to consistent and enduring public criticism, which is what these intentional infliction cases represent. In a democracy, the media have the important jobs of informing the electorate and serving as a watchdog on government. In other words, they media have a duty to serve the electorate, and the electorate is voicing dissatisfaction.[119] The media need to listen.

The courts, too, are implicitly criticizing the media's performance as government watchdog and informer of the electorate when they portray them as commercial entities in search of entertainment material. First Amendment protections stem from the press' role in a democracy, and as the media stray from that role, these protections are weakening. In the past, courts have been very liberal in their definition of public interest. Through careless behavior, the media have pressured the courts to find the limits of public interest, and courts have begun to do so. The berated brides are cases in point.

Media scholars are acutely aware of public wrath toward the press. "Accumulated distrust of the news media, skepticism of journalists' ethics, and a resentment of media power are very nearly permanent features of the contemporary American scene," wrote ethicist Edmund B. Lambeth. "[I]t is past time for journalists and owners of newspapers and radio and television stations to articulate principles of performance that are publicly visible, ethically defensible, and rooted clearly in a philosophic tradition that continues to justify a free press."[120] Lambeth is not alone; other contemporary media ethicists share this view.[121] In response to this crisis of confidence, Lambeth has developed a framework of principles for journalism ethics. Among these principles are several with particular relevance to this discussion of intentional infliction: truthfulness, humaneness and stewardship.

The newsgathering process can be assessed in terms of its truthfulness, that is, whether it involves active or passive deception. This survey has shown that deception in newsgathering has been at issue in several claims of intentional infliction. The principle of humaneness — do no direct harm, prevent harm, render needed assistance[122] — also can be applied to journalists' interactions with the subjects of their stories. This survey has shown that, true to the name of the tort, plaintiffs who claimed intentional infliction felt hurt, often at a time of deep personal vulnerability, by the media action that gave rise to their suits. The principle of stewardship means that journalists "manage their resources of communication with due regard for the rights of others, the rights of the public, and the moral health of their own occupation."[123] This survey has shown that the recent sharp increase in claims of intentional infliction is a signal that journalists need to engage in some reflection on their professional performance. A full discussion of the ethicality of the journalistic behavior and publication decisions involved in these legal cases is beyond the scope of this paper. Rather, this brief discussion of ethics is intended to suggest that journalists, by paying a little more attention to ethical principles, and by thinking about why they have First Amendment protection in the first place, could keep themselves out of court.

Courts can formally articulate what they have been doing all along: ruling that content cannot serve as the basis of a claim of intentional infliction against the media. As this survey showed, most claims have focused on media content rather than newsgathering practices, so such a ruling could greatly reduce litigation. Courts also need to bring some consistency to rulings about what constitutes outrageous newsgathering behavior. Newsgathering practices are a contentious topic today, and it is beyond the scope of this paper to settle this complex controversy. However, courts must bear in mind that reporting on matters of public concern will necessarily require journalists to visit scenes of death, disaster and crime. Even the most sensitive reporter is bound to offend someone. The media could not fulfill their duty to democracy without dispatching reporters to such scenes. Courts must be careful to weigh the media's interest in fulfilling these duties against the plaintiff's interest in avoiding harm.

CONCLUSION

Claims of intentional infliction against the media are increasing. Most claims have focused on the content of a report, and most courts have wisely rejected such claims. News, by definition, deals with the difficult issues of the day. With today's mass audience being bombarded by reports — some sought, some unsought — from many media, it is inevitable that some audience members will be offended by some reports. The news media have an established democratic duty to inform the electorate about these issues. They must continue to deliver this information so citizens can effectively govern themselves.

Although courts have generally protected the media's interest in free expression in these cases, media continue to face legal defense costs associated with intentional infliction claims. These costs could be reduced in two ways. First, courts could explicitly rule that it is not permissible to claim intentional infliction based on the content of a media report. Second, the media can try to adhere to the ethical principles of humaneness and truthfulness, to prevent plaintiffs from trying to use the legal system to vent their anger about what they view as inappropriate content. In the best of all worlds, this means that journalists in the throes of deadline pressure need to take a deep breath and remember to treat story subjects kindly. In a more cynical world, this means reporters must stop taking advantage of sources' naiveté and trauma, even if it means giving up footage of an emotional scene or the information gained from the candor of suffering.

Courts have had a sympathetic ear for the few claims of intentional infliction focused on newsgathering behavior. These claims fit into the broader contemporary controversy about appropriate limits on newsgathering, an active area of the law. The First Amendment provides only limited protection for newsgathering, so the media are on more dangerous turf in these claims. The media might avoid such claims by making decisions about the use of controversial newsgathering techniques within the context of their democratic duties. This study has shown that, when intentional infliction claims were allowed to proceed, the defendant sometimes could not mount a credible newsworthiness or public interest defense.

For their part, plaintiffs should heed the words of legal scholar Magruder. More than 60 years have passed since his seminal article on intentional infliction was published, but his advice is still good today: "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is better protection than the law could ever be."[124] Brides would do well to cloak themselves in self-confidence as well as illusion lace.

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[1] Kersis v. Capital Cities/ABC Inc., 22 Media L. Rep. (BNA) 2505 (Cal. Super. Ct. 1997). In Sanders v. Capital Cities/ABC Inc., No. 59693, 1999 Cal. LEXIS 3900 (Cal. Jun. 24, 1999), the California Supreme Court reconsidered the plaintiffs' intrusion claim.

[2] The article was Robert E. Drechsel, "Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media," 89 *Dick. L. Rev.* 339 (1985). Drechsel identified at least 35 cases, all but six of which were decided since 1978. Id. at 346.

[3] *See, e.g.*, Michelle Johnson, "Of Public Interest: How Courts Handle Rape Victims' Privacy Suits, 4 *Comm. L. & Pol'y* 201 (1999), at 208-209.

[4] *See, e.g.*, Richard Labunski, " The First Amendment at the Crossroads: Free Expression and New Media Technology," 2 *Comm. L. & Pol'y* 165 (1997), at 181-84.

[5] KOVR-TV Inc. v. Superior Court (Whittle), 37 Cal.Rptr.2d 431, 436 (Cal.App.3Dist. 1995).

[6] For discussion of the role of the press in a democracy, *see, e.g.*, David A. Anderson, "The Origins of the Press Clause," 30 *UCLA L. Rev.* 455 (1983); Vincent Blasi, "The Checking Value in First Amendment Theory," 1977 *Am. B. Found. Res. J.* 522 91977); Potter Stewart, "Or of the Press," 26 *Hastings L. J.* 631 (1975).

[7] Ellen Willis, "Monica and Barbara and Primal Concerns," *New York Times*, March 14, 1999, p. 31.

[8] Daniel Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct," 82 *Colum. L. Rev.* 42 (1982).

[9] Calvert Magruder, "Mental and Emotional Disturbance in the Law of Torts," 49 *Harv.L.Rev.* 1033 (1936).

[10] *Id.* at 1035.

[11] Daniel Givelber, "The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct," 82 *Colum. L. Rev.* 42 (1982).

[12] State Rubbish Collectors Association v. Siliznoff, 240 P.2d 282 (Cal. 1952), discussed in Carl Tobias, "Intentional Infliction of Mental Distress in Montana," 57 *Mont. L. Rev.* 99 (1996).

[13] *Restatement (Second) of Torts*, Sec. 46 (1965), comment c.

[14] Other articles have a narrow focus; *see, e.g.*, David B. Millard, "Intentionally and Negligently Inflicted Emotional Distress: Toward a Coherent Reconciliation," 15 *Indiana L.J.* 617 (1982) and C. Tobias, "Intentional Infliction in Montana," 57 *Mont. L. Rev.* 99 (1996). Still others cover related topics; *see, e.g.*, Sandra Davidson, "Blood Money: When Media Expose Others to Risk of Bodily Harm," 19 *Hastings Comm/Ent L.J.* 225 (1997) (considers negligence as a cause of action against the media) and Robert E. Drechsel, "Negligent Infliction of Emotional Distress: New Tort Problem for the Mass Media," 12 *Pepp. L. Rev.* 889 (1985).

[15] Givelber, *supra* note 8, at 1.

[16] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, Sec. 12 at 56 (5th ed. 1984).

[17] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, Sec. 12 at 61 (5th ed. 1984).

[18] Givelber, supra note 8, at 75.

[19] Drechsel, supra note 2.

[20] 485 U.S. 46 (1987).

[21] *Id.* at 48.

[22] *Id.* at 50.

[23] *Id.* at 53.

[24] *Id.* at 56.

[25] *Restatement (Second) of Torts*, Sec. 46 (1965).

[26] *Id.*, comment d.

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[27] W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, Sec. 12 at 59 (5th ed. 1984).

[28] One plaintiff sued over a legal advertisement. *See* Williams v. Nathan, 21 Media L. Rep. 1339 (E.D. Va. 1993).

[29] Jones v. Clinton, 990 F.Supp. 657 (E.D.Ark. 1998).

[30] *Id.* at 677-78.

[31] These 57 cases included a total of 60 court opinions.

[32] *See infra* at 17.

[33] A line of U.S. Supreme Court cases has emphasized the limited protection provided by the First Amendment for newsgathering: Branzburg v. Hayes, 408 U.S. 665 (1972); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post Co., 417 U.S. 843 (1974); and Houchins v. KQED Inc., 438 U.S. 1 (1978). A First Amendment right of access was first recognized in Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), with the court emphasizing the press' structural role in maintaining a republican system of government. In that case, the Court held that the right of the press and public to attend criminal trials is guaranteed under the First Amendment.

[34] __U.S.__ (1999)(No. 98-83).

[35] Berger v. Hanlon, 24 Media L. Rep. 1748 (D.Mont. 1996).

[36] Berger v. Hanlon, 25 Media L. Rep. 2505 (9th Cir. 1997).

[37] *Id.* at 2509.

[38] *Id.* at 2510.

[39] *Id.* at 2511.

[40] Wilson v. Layne, __U.S.__ (1999)No. 98-83), at 4.

[41] Id. at 10 (footnote omitted).

[42] 22 Media L. Rep. 2321 (Cal.Sup. Ct. 1994).

[43] *Id.* at 2324.

[44] *Id.* at 2329.

[45] 37 Cal.Rptr.2d 431 (Cal.App.3 Dist. 1995).

[46] *Id.* at 433.

[47] *Id.* at 434.

[48] *Id.* at 435.

[49] 491 U.S. 524 (1989).

[50] 301 U.S. 103 (1937).

[51] Nicholson v. McClatchy Newspapers, 177 Cal.App.3d 509, 518, 1 Media L. Rep. 2009 (1937).

[52] 37 Cal.Rptr. 431, 436 (Cal.App.3Dist. 1995).

[53] 828 F.Supp. 745, 21 Media L. Rep. 2065 (N.D. Cal. 1993).

[54] Id. at 2071.

[55] *Id.* at 2073.

[56] *Id.* at 2069.

[57] *Id.*

[58] See the citations at n.33, supra.

[59] 26 Media L. Rep. (BNA) 1941 (N.Y. App.Div. 1997).

[60] 17 Media L. Rep. (BNA) 2069 (Conn. Super. Ct. 1990).

[61] *Id.* at 2071.

[62] This was before the U.S. Supreme Court said in Milkovich v. Lorain Journal, 497 U.S. 1 (1990), that the oft-quoted passage, "Under the First Amendment there is no such thing as a false idea," from Gertz v. Robert Welch Inc., 418 U.S. 323 (1974), 339, was not "intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'" Milkovich at 12.

[63] Murray v. Schlosser, 17 Media L. Rep. (BNA) 2069 (Conn. Super. Ct. 1990).

[64] 20 Media L. Rep. 2105, 2106 (Ill. 1992).

[65] *Id.* at 2113.

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[66] People's Bank & Trust Co. v. Globe International, 19 Media L. Rep. 2097, 2101 (W.D. Ark 1992).

[67] *Id.* at 2101 (citation omitted).

[68] 18 Media L. Rep. 2280 (D.D.C. 1991). *See also* Foretich v. Glamour, 18 Media L. Rep. 1672 (D.D.C. 1990) and Foretich v. Glamour, 17 Media L. Rep. 1729 (D.D.C. 1990)

[69] Foretich v. Advance Magazine Publishers, 18 Media L. Rep. 2280, 2284 (D.D.C. 1991).

[70] *Editor & Publisher International Yearbook*, Part I, at II-32 (1998).

[71] Claims of intentional infliction based on content, and in which courts used the four-part test to decide, were: Cleary v. News Corp., 30 F.3d 1255, 22 Media L. Rep. 2076 (9th Cir. 1994); Covey v. Detroit Lakes Publishing, 20 Media L. Rep. 1671 (Minn. Ct. App. 1992); Doe v. Hearst, 25 Media L. Rep. 1483 (N.Y. Sup. Ct. 1996); Holtzscheiter v. Thomson Newspapers Inc., 19 Media L. Rep. 1717 (S.C. 1991); Fitch v. Voit, 21 Media L. Rep. 1863 (Ala. 1993); Hartwig v. NBC, 22 Media L. Rep. 2535 (N.D. Ohio 1994); Howe v. New York Post Co., 23 Media L. Rep. 1955 (N.Y. Sup. Ct. 1995); Howell v. New York Post, 21 Media L. Rep. 1273 (N.Y. 1993); Hyatt v. Purcell, 24 Media L. Rep. 1250 (Mass. Sup. Ct. 1995); Preston v. Martin Bregman Productions Inc., 19 Media L. Rep. 1057 (S.D.N.Y. 1991); Kolegas v. Heftel Broadcasting Corp., 20 Media L. Rep. 2105 (Ill. 1992); Lish v. Harper's Magazine, 20 Media L. Rep. 2073 (S.D.N.Y. 1992); Merriwether v. Shorr, 23 Media L. Rep. 1830 (N.Y. Sup. Ct. 1995); Norris v. KUTV Inc., 24 Media L. Rep. 1255 (Utah Dist. Ct. 1995); Polsby v. Spruill, 25 Media L. Rep. 2259 (D.D.C. 1997); Salgado v. Joyner Management Services Inc., 26 Media L. Rep. 1595 (N.C. Ct. App. 1997); Sanchez Duran v. The Detroit News Inc., 21 Media L. Rep. 1891 (Mich. Ct. App. 1993); Stith v. Cosmos Broadcasting Co., 25 Media L. Rep. 1151 (Ky. Cir. Ct. 1996); Weinstein v. Bullick, 22 Media L. Rep. 1481 (E.D. Pa. 1993); White v. Manchester Enterprise Inc., 23 Media L. Rep. 1309 (E.D. Ky. 1994); Williams v. Nathan, 21 Media L. Rep. 1339 (E.D. Va. 1993); Zeran v. Diamond Broadcasting Co., 26 Media L. Rep. 1855 (W.D.Okla. 1997).

[72] 25 Media L. Rep. 2104 (N.D. Ohio 1997).

[73] *Id.* at 2105.

[74] "Cops" is produced by Barbour-Langley Productions, also a defendant in the suit; Fox was not present when the taping took place.

[75] *Id.* at 2109, n.5. The court added that Fox was entitled to summary judgment on all claims based on entry into Reeves' home and on the videotaping because its only role was to assure that the episode met broadcast standards and then broadcast the show.

[76] Reeves was charged with felonious assault and later pleaded guilty to a lesser felony charge. He received a suspended prison sentence.

[77] Public figure doctrine, of course, makes a distinction between voluntary and involuntary conduct. *See, e.g.*, Gertz v. Robert Welch Inc., 418 U.S. 323 (1974). However, the court in Reeves did not discuss this issue.

[78] 21 Media L. Rep. 1273 (N.Y.Ct.App. 1993).

[79] See also Veilleux v. National Broadcasting Co., 26 Media L. Rep. (BNA) 1929 (1998). Although Dateline NBC journalists were accused of misrepresentations and invasion of privacy, these actions could not be construed as outrageous as a matter of law.

[80] 487 F.2d 986, 995 (2d Cir. 1973)

[81] 21 Media L. Rep. 1273, 1278 (N.Y.Ct. App. 1993).

[82] *See, e.g.*, Stith v. Cosmos Broadcasting, 25 Media L. Rep. 1151 (Ky.Cir.Ct. 1996).

[83] 21 Media L Rep 1891 (Mich.Ct.App. 1993). The plaintiff in Sanchez Duran was a former Colombian judge who left that country after she indicted a drug lord. She relocated to Detroit and was concerned about her safety, only to have the local media print and broadcast stories about her new residence. She claimed intentional infliction, but the court ruled in favor of the media, noting that Sanchez Duran had leased the Detroit apartment in her own name.

[84] For a detailed discussion of this topic and a particularly relevant case, Hyde v. City of Columbia, 637 S.W.2d 251 (Mo.App. 1982), *cert. denied*, 459 U.S. 1226 (1983), *see* Davidson, *supra* note 14, at 252-254.

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[85] Other cases in which courts cited First Amendment concerns in dismissing intentional infliction claims against the media were Clark v. Clark, 21 Media L. Rep. 2082 (Fla.Cir.Ct. 1993); Chaiken v. VV Publishing Corp. 119 F.3d 1018 (2d Cir. 1997); Glickman v. Stern, 19 Media L. Rep. 1769 (N.Y. Sup. Ct. 1991); Gold v. Harrison, 24 Media L. Rep. 1383 (Hawaii Cir.Ct. 1995); LeFever v. Great Falls Tribune, 24 Media L. Rep. 2086 (Mont.Dist.Ct. 1995); McNamara v. Freedom Newspapers, 18 Media L. Rep. 1679 (Tex. Ct. App. 1991); Tackett v. KRIV-TV, 22 Media L. Rep. 2092 (S.D. Tex. 1994); and Wavell v. Caller-Times Publishing Co., 18 Media L. Rep. 2204 (Tex. Ct. App. 1991). The exception to this rule is Esposito-Hilder v. SFX Broadcasting Inc., 26 Media L. Rep. 1541 (N.Y. App. 1997), a content-based case in which the court cited the First Amendment but decided in favor of the plaintiff nonetheless.

[86] 21 Media L. Rep. 1090 (Cal.App. 1993).

[87] Foreman v. Lesher, 21 Media L. Rep. 1090 (Cal.App. 1993) at 1094, quoting Blatty v. NY Times Co., 42 Cal. 3d 1033, 1042-43 (13.MLR 1929].

[88] 25 Media L. Rep. 1283 (Nev.Dist.Ct. 1996).

[89] *Id.* at 1285.

[90] *Id.*, quoting Kelley v. Post Publishing Co., 98 N.E.2d 286, 287 (1951).

[91] *See also* Berger v. Hanlon, 24 Media L. Rep. 1748 (D.C. Mont. 1996); Hogan v. Hearst, 25 Media L. Rep. 2134 (Tex. Ct.App. 1997); Lence v. Hagadone Investment, 21 Media L. Rep. 1941 (Mont. 1993); Posner v. New York Post. Co., 26 Media L. Rep. 1634 (N.Y. Sup. Ct. 1997); Raskin v. Swann, 23 Media L. Rep. 2054 (Ga.Ct.App. 1995); Sanchez v. Affiliated Publications Inc., 22 Media L. Rep. 1188 (Mass.Super.Ct. 1993); Tucker v. News Publishing Co., 18 Media L. Rep. 1684 (Ga. Ct. App. 1990); Wright v. Grove Sun Newspaper Co., 22 Media L. Rep. 1801 (Okla. 1994);

[92] Brown v. Hearst Corp., 54 F.3d 21, 23 Media L. Rep. 1984 (1st Cir. 1995), quoting Agis, 355 N.E.2d at 319 (quoting other authorities).

[93] Wright v. Grove Sun Newspaper Co. Inc., 22 Media L. Rep. 1801, 1807 (Okla. 1994).

[94] 688 A.2d 805 (RI 1996).

[95] Physically manifested harm is typically required in claims for negligent infliction of emotional distress but not intentional infliction. *See* Drechsel, *supra* note 14, at 911.

[96] For an analysis of this aspect of the case, *see* Davidson, *supra* note 14. In *Norris v. KUTV Inc.*, the court ruled that a corporation cannot sue for intentional infliction of emotional distress. It also ruled that no outrageous behavior had taken place.24 Media L. Rep. 1255 (Utah Dist.Ct. 1995).

[97] Polsby v. Spruill, 25 Media L. Rep. 2259 (D.D.C. 1997). The plaintiff, a physician, claimed that the novel at issue, My Soul to Take, was based on her life story. She claimed intentional infliction because the character in the novel had a romantic relationship with a patient and broke into two houses and an office.

[98] Baugh v. CBS Inc., 828 F.Supp. 745 (N.D.Calif. 1993); Berger v. Hanlon, 24 Media L. Rep. 1748 (D.Mont. 1996); and Reeves v. Fox Television Network.

[99] Kersis v. Capital Cities/ABC Inc., 22 Media L. Rep. 2321 (Cal.Sup.Ct. 1994); Tackett v. KRIV-TV, 22 Media L. Rep. 2093 (S.D.Tex. 1994).

[100] KOVR-TV Inc. v. Superior Court (Whittle), 37 Cal.Rptr.2d 431 (Cal.App.3Dist. 1995).

[101] Howell v. New York Post, 21 Media L. Rep. 1273 (N.Y.Ct.App. 1993).

[102] Natoli v. Sullivan, 21 Media L. Rep. 2097 (N.Y.Sup.Ct. 1993); Wright v. Grove Sun Newspaper Co., 22 Media L. Rep. 1801 (Okla. 1994).

[103] Many non-media cases involve the mishandling of dead bodies. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, Sec. 12, at 63 (5th ed. 1984).

[104] They are Clift v. Narragansett Television, 688 A.2d 805 (R.I. 1993); Chastain v. Valley Broadcasting, Fitch v. Voit, 624 So.2d 542 (Ala.Sup.Ct. 1993); Hartwig v. NBC, 863 F.Supp. 558 (N.D.Ohio 1994); Hogan v. Hearst, 25 Media L. Rep. 2134 (Tex.Ct.App. 1997);); Holtzscheiter v. Thomson Newspapers Inc., 19 Media L. Rep. 1717 (S.C. 1991) and Upchurch v. New York Times Co., 341 S.E.2d 558 (S.C.Super.Ct. 1993).

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[105] They are Clift v. Narragansett Television, 688 A.2d 805 (R.I. 1993); Hartwig v. NBC, 863 F.Supp. 558 (N.D.Ohio 1994); and Hogan v. Hearst, 25 Media L. Rep. 2134 (Tex.Ct.App. 1997).

[106] Hartwig v. NBC, 22 Media L. Rep. 2535 (N.D. Ohio 1994).

[107] 25 Media L. Rep. 2134 (Tex.Ct.App. 2134).

[108] *Id*. at 2138.

[109] They are Doe v. Hearst Corp., 25 Media L. Rep. 1483 (N.Y. Sup. Ct. 1996); Sanchez v. Affiliated Publications, Weinstein v. Bullick, 22 Media L. Rep. 1481 (E.D. Pa. 1993) and Clark v. Clark, 21 Media L. Rep. 2082 (Fla.Cir.Ct. 1993).

[110] Doe v. Hearst Corp., 25 Media L. Rep: 1483 (N.Y. Sup. Ct. 1996); Sanchez v. Affiliated Publications.

[111] Doe v. Hearst Corp., 25 Media L. Rep. 1483 (N.Y. Sup. Ct. 1996).

[112] Weinstein v. Bullick, 22 Media L. Rep. 1481 (E.D. Pa. 1993).

[113] 22 Media L. Rep. 1188 (Mass. Super. Ct. 1993).

[114] 23 Media L. Rep. 1830 (N.Y. Sup. Ct. 1995).

[115] *Id*. at 1831.

[116] A number of other cases dealt with imputations of crime, professional misconduct and drug use. *See* Brown v. Hearst Corp., 54 F.3d 21 (1st Cir. 1995) (airline pilot whose wife had been missing for six months filed over broadcast that suggested that the wife's disappearance could be an unsolved murder, and mentioned that another pilot was convicted of murdering his wife and disposing of her body with a woodchipper); Crall v. Gannett Satellite Information Network, 20 Media L. Rep. 1987 (S.D. Ohio 1992) (automotive repair shop owner sued over newspaper coverage of a charge of possession of marijuana); Covey v. Detroit Lakes Publishing Co., 20 Media L. Rep. 1671 (Minn. Ct. App. 1992) (family members object to ambiguous newspaper article confusing them with relative outside whose residence a murder occurred); Foreman v. Lesher Communications, 21 Media L. Rep. 1090 (Cal.App. 1993) (deckhand objected to a newspaper article that erroneously portrayed him as a drug dealer); Foretich v. Advance Magazine Publishers Inc., 18 Media L. Rep. 2281 (D.D.C. 1991); Lence v. Hagadone Investment Co., 21 Media L. Rep. 1641 (Mont. 1993) (attorney filed claim over newspaper articles about a claim of professional misconduct and about municipal charges that he violated the building code); McGee v. Times Leader, 18 Media L. Rep. 1748 (M.D. Pa. 1990) (plaintiff sued over newspaper article saying he "managed to avoid a prison sentence despite a conviction on federal tax evasion charges"); McKinney v. Avery Journal Inc., 18 Media L. Rep. 1204 (N.C. Ct. App. 1990) (plaintiff sued over published accusations of kidnap and rape); Newcombe v. Adolf Coors Co., 26 Media L. Rep. 2364 (9th Cir. 1998) (baseball player who is recovering alcoholic sued over a beer advertisement that included his likeness); Posner v. New York Post Co., 1935 Media L Rep. 1934 (N.Y. Sup. Ct. 1997) (State Supreme Court justice filed over newspaper article listing him as one of the 10 worst judges in the state); Tackett v. KRIV-TV, 22 Media L. Rep. 2092 (S.C.Tex. 1994) (attorney claimed a broadcast falsely portrayed him as arranging adoptions without a license); Veilleux v. National Broadcasting Co., 26 Media L. Rep. 1929 (D.C. Me. 1998) (trucker sued over broadcast about drug use among truckers); Wavell v. Caller-Times Publishing, 18 Media L. Rep. 2204 (Tex. App. 1991); and Wright v. Grove Sun Newspaper Co., 22 Media L. Rep. 1801 (Okla. 1994) (filed by man mentioned in transcript of conversation of two undercover narcotics agents that was released to the press and public).

[117] 21 Media L. Rep. 1339 (E.D.Va. 1993).

[118] *Editor & Publisher International Yearbook*, Part I, at I-441 (1998). A frivolous case that did not involve a media defendant but was interesting was *Sagan v. Apple Computer Inc.* 22 Media L. Rep. 2321(C.D.Cal. 1994). The court decided that Apple's use of the term "butt-head astronomer" as a code name for a personal computer, even after astronomer Carl Sagan demanded that the company stop using the name, did not support a claim of intentional infliction.

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[119] Intentional infliction cases are, of course, just one indication of public dissatisfaction with the press. The verdict in the 1997 Food Lion case is another example. *See, e.g.,* Howard Kurtz and Sue Anne Pressley, "Jury Finds Against ABC for $5.5 Million; Punitive Damages Awarded to Food Lion Over Hidden-Camera Report," *Washington Post*, Jan. 23, 1997, at A1. Coverage of President Clinton's relationship with intern Monica Lewinsky has been another focal point. *See, e.g.*, Dylan Loeb McClain, "From Mostly Wrong to Just About Right," *New York Times*, Aug. 31, 1998, at C5 (national edition); Albert R. Hunt, "Washington Events Fuel Disdain for Media, Politics," *Wall Street Journal*, Sept. 17, 1998, at A12.

[120] Edmund B. Lambeth, *Committed Journalism: An Ethic for the Profession* (Bloomington and Indianapolis: Indiana University Press, 2d ed.,1992), at 1.

[121] *See, e.g.*, John C. Merrill, *Journalism Ethics: Philosophical Foundations for News Media* (New York: St. Martin's Press, 1997), at 1.

[122] Lambeth, *supra* note 120, at 31.

[123] *Id.* at 32.

[124] Magruder, *supra* note 9, at 1035.

Running Head: RENO V. ACLU AND ITS PROGENY

Law

RENO V. ACLU AND ITS PROGENY: IMPLICATIONS FOR COMMUNICATION PROFESSIONALS

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Abstract

In *Reno v. ACLU*, the Supreme Court's first encounter with the Internet and an indicator of the medium's legal future, the Court ruled the Communications Decency Act of 1996 unconstitutional and granted the Internet the broadest possible protection under the First Amendment. In this paper, the author discusses the issues surrounding the Internet, the Communications Decency Act, and the Court rulings in the case, as well as the implications the case has for the future.

Reno v. ACLU and Its Progeny: Implications for Communication Professionals

Reno v. ACLU was the Supreme Court's first encounter with the Internet and thus serves as an important indicator of the medium's legal and legislative future in the United States. In this case, the Supreme Court ruled the Communications Decency Act of 1996 unconstitutional and "provided the Internet with the broadest possible First Amendment protection" (Cox, 1998).

Because this decision has such important implications for the future, it is vital for communicators, and indeed all users of the Internet, to understand the nature of the Internet and the Court's reasoning in this case. In Part I of this paper the author will introduce the reader to the Internet, the issues and concerns surrounding the medium, and the government's first attempt at regulation--the Communications Decency Act. The reasoning and final rulings of the District Court and the Supreme Court in *Reno v. ACLU* will be detailed in Part II. Finally, the author will analyze the implications of the Supreme Court's decision and current Internet cases on the federal level in Part III.

PART I: Introduction

A. The Internet: History, Characteristics, and Controversies

The medium known today as the Internet began in 1969 with a U.S. military initiative called ARPANET. This primitive network of computers was designed to allow communication among the military, its defense contractors, and research universities, even in times of war (*ACLU v. Reno*, 929 F. Supp. 824 at 847, 848, 1996). Although ARPANET is no longer in existence, its outgrowth, the Internet, has expanded at an incredible rate in recent years. The number of host computers in 1981 was 300; as of 1996, the number had reached approximately 9,400,000 (*ACLU v. Reno*, 929 F. Supp. 824 at 847, 1996).

Just what is the Internet? In simple terms it is a network of computers that can talk to one another in a common language through phone lines or direct connections (Pfaffenberger and Gutzman, 1998). This network enables millions of people worldwide to communicate with one another for myriad purposes. Today the Internet is being used for academic, commercial, and entertainment purposes, just to name a few.

There are several ways to communicate via the Internet: e-mail, the World Wide Web, chat rooms, newsgroups, and automatic mailing lists. While these methods may differ in some ways, they all have important features in common. They are all highly decentralized, anonymous, and available to anyone with the necessary equipment. As will be discussed later, these features make it almost impossible to regulate the Internet.

According to the 1998 Statistical Abstract of the United States, more than 62 million Americans have access to the Internet: 35 million own personal computers, and 78 percent of schools have web access (projected to grow to 95 percent by 2000) (Leonard, 1998). Add this to the number of people worldwide who have Internet access, and the figures become mind-boggling.

Obviously, with this many people accessing the Internet, there are going to be disagreements about its content and use. One of the biggest issues today is the use of the Internet for sending and receiving indecent and obscene materials. While the courts have regulated access to obscenity in the print and broadcast media, it is extremely difficult to regulate its appearance on the Internet, as discussed above. Several companies have marketed software that aids parents in limiting the Internet access of minors, but this software can be expensive and easily evaded by computer-savvy children. With the number of children using the Internet today, the issue of obscenity has many parents, educators, and government officials worried.

They may have good reason to worry. One study of Internet usage found that almost one-fifth of visitors to adult websites are between the ages of 12 and 17. For males between the ages of 12 and 17, adult websites are second in popularity only to on-line gaming (Plotnikoff. 1998). And these minors have plenty of websites from which to choose: there are an estimated 600 pornographic sites on the Internet with approximately 39 new sites cropping up daily (Werst. 1998). Since on-line pornographic entertainment is the third largest moneymaker in cyberspace, pulling in an estimated annual revenue of $100 million. the business is expected to continue its phenomenal growth (Werst. 1998).

Because of these realities and the concerns of parents. educators. and others. the U.S. government has tried to come up with ways to regulate children's access to pornographic content on the Internet. But these efforts have run into problems attributable to the unique nature of the medium. Criteria used to regulate other media. such as newspapers. telephones. and television, are not applicable to the Internet. For example, the courts have ruled that broadcast media can be restricted because of a scarcity of spectrum space. As the Supreme Court ruled in *Red Lion Broadcasting Co. v FCC* (395 U.S. 367, 1969), the limited number of broadcast frequencies available means indecent speech would come at the expense of other forms of communication. The Internet does not have any such access restrictions. In cases such as *FCC v. Pacifica Foundation* (438 U.S. 15, 1973). the courts have restricted the content of the broadcast media based on its invasive nature. Children can easily happen upon indecent material by accident. As will be explained later, the courts found that Internet content is sought after and does not have the same invasive nature as the broadcast media (Djavaherian, 1998).

B. The Communications Decency Act of 1996

The U.S. government's first attempt to regulate the Internet came on February 8, 1996, with the enactment of the Telecommunications Act of 1996. This act had the primary purpose of reducing regulation and encouraging "the rapid deployment of new telecommunications technologies" (Pub. L. 104-104, 110 Stat. 56). Most of the act had nothing to do with the Internet, but was concerned with the local telephone service market, multichannel video market, and the market for over-the-air broadcasting (*Reno v. ACLU*, 521 U.S. 844 at 869, 1997). The act consisted of seven titles, six of which arose from House of Representatives and Senate committee hearings and were discussed in reports prepared by these committees.

By contrast, Title V, the Communications Decency Act of 1996 (CDA or the Act), contained provisions that were "either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation" (*Reno v. ACLU*, 521 U.S. 844 at 870, 1997). One of these amendments was the subject of the ACLU's challenge because it contained the so-called "indecent transmission" and "patently offensive" provisions. These provisions, largely based on the Miller v. California decision of 1973 which ruled that the First Amendment does not protect obscene speech, read in part:

> "Whoever in interstate or foreign communications, by means of a telecommunications device, knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communications which is obscene or indecent. knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication"; and
>
> "Whoever in interstate or foreign communications knowingly uses an interactive computer service to send to a specific person or persons under 18 years of age, or uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited (above) with the intent that it be used for such activity . . ." (47 U.S.C. 223).

The punishment for engaging in these activities was a fine and/or imprisonment of not more than two years.

The government put these provisions in the Communications Decency Act for two reasons. First, the growing public concern over the availability of obscene and indecent material on the Internet forced Congress to address the issue. The problem had sparked such debate that Congress could not ignore it any longer (Pagidas, 1998). Second, some in the government felt that new users would be kept away from the Internet by fears of the potential dangers of children accessing obscene materials, halting the rapid expansion of the medium before it reached its full potential (*Reno v. ACLU*, 521 U.S. 844 at 916, 1997). The government felt it had a significant interest in fostering the Internet's growth and thus wanted to limit any forces it felt would inhibit that growth.

President Clinton was a great proponent of the Communications Decency Act. Although the administration had a history of siding with civil liberties groups and Silicon Valley computer companies, the president supported the CDA and pledged to fight for its adoption (Mauro, March 1997). Congress had criticized his administration several years earlier for being lax in prosecuting child pornographers (Greenhouse, 1997). The CDA gave the president an opportunity to prove his stance against obscenity to his opponents and the country.

Many in the legal community did not agree with the government that the provisions of CDA were defined narrowly enough to avoid infringing on the First Amendment rights of adults. On the same day the Telecommunications Act was signed into legislation by President Clinton, 20 plaintiffs filed suit against the attorney general and the Department of Justice to challenge the constitutionality of the "indecent transmission" and "patently offensive" provisions. The plaintiffs had no quarrel with the restrictions on obscenity, but were worried about the definitions of "indecent" and "patently offensive," as well as the ban on communication about sexual and excretory organs. One week later District Judge Ronald Buckwalter placed a temporary restraining order against the enforcement of those portions of the CDA, while upholding the constitutionality of the sections dealing with obscenity. He was troubled by the "unconstitutionally vague" use of the term "indecent." In his final decision he stated, "It is a most compelling constitutional reason to require of a law that it reasonably informs a person of what conduct is prohibited particularly when the violation of the law may result in fines, imprisonment, or both" (*ACLU v. Reno*, 24 Med. L. Rptr. 1379 at 10, 1996). A second suit, with 27 additional plaintiffs, was filed and the two cases were consolidated. The case was eventually heard by a three-judge District Court before it went to the Supreme Court in March 1997 (*Reno v. ACLU*, 521 U.S. 844, 1997). Because the CDA contained a provision for "fast-track" review, the case was able to bypass the appeals court (Djavaherian, 1998).

It is useful to note just who the plaintiffs in this case were. They were not Internet pornographers, but rather a diverse collection of journalistic, healthcare, educational, and computer industry groups who either feared that their Internet speech would be restricted or who were against restricting free speech in principle. In fact, the plaintiffs made it clear that they did not dispute the CDA's restrictions on materials not protected by the First Amendment, such as child pornography or obscenity (ACLU Complaint). But they were worried that websites containing information on birth control, AIDS prevention, or art, all of which could include references to or images of sexual organs, would be outlawed by the Act. They pointed out that a broad reading of the Act could be used to punish a parent for e-mailing birth control information to his/her child. Of special interest to journalists, organizations such as the American Society of Newspaper Editors, the National Press Photographers Association, and the Society of Professional Journalists were plaintiffs in the suit (*Reno v. ACLU*, 521 U.S. 844 at 874, 875, 1997).

PART II: Court Decisions

A. The District Court

The District Court decided the case on June 11, 1996, finding the Communications Decency Act facially unconstitutional. The written opinion included a lengthy discussion of the nature of cyberspace, the accessibility of the Internet, content-blocking software, sexually explicit material on the Internet, and age-verification techniques. This analysis would prove to be very important to the Supreme Court's eventual decision. Judges Dolores Sloviter, Ronald Buckwalter, and Stewart Dalzell filed separate opinions focusing on different aspects of the case.

Judge Sloviter, from the United States Court of Appeals for the Third Circuit, was concerned with the expansive reach of the CDA. She stated in her opinion, "Whatever the strength of the interest the government has demonstrated in preventing minors from accessing 'indecent' and 'patently offensive' material on-line, if the means it has chosen sweeps more broadly than necessary and thereby chills the expression of adults, it has overstepped onto rights protected by the First Amendment" (*ACLU v. Reno*, 929 F. Supp. 824 at 925, 1996). She agreed with the plaintiffs that the CDA's provisions could be used to censor material that is widely considered educational, artistic, or newsworthy. Additionally, what one community might consider educational, another could consider indecent under the vague terms of the Act. She concluded, "The CDA is patently a government-imposed content-based restriction on speech, and the speech at issue, whether denominated 'indecent' or 'patently offensive,' is entitled to constitutional protection" (*ACLU v. Reno*, 929 F. Supp. 824 at 919, 1996).

Judge Buckwalter, from the United States District Court for the Eastern District of Pennsylvania and the judge who issued the temporary restraining order on the CDA, again argued that the language used in the Act was "so vague as to violate both the First and Fifth Amendments" (*ACLU v. Reno*, 929 F. Supp. 824 at 944, 1996). He stressed, "In statutes that break into relatively new areas . . . the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this new context" (*ACLU v. Reno*, 929 F. Supp. 824 at 965, 1996). Additionally, he was not convinced that the age-verification systems that the Act would require "indecent" Internet content providers to use would be affordable or effective. He feared that cost of the systems would keep many people from expressing themselves through the Internet and would not keep minors from accessing truly obscene material.

Judge Dalzell, also of the United States District Court for the Eastern District of Pennsylvania, was particularly bothered by the Government's lack of consideration for the special characteristics of the Internet. He stated that a "medium-specific approach to mass communication examines the underlying technology of the communication to find the proper fit between First Amendment values and competing interests" (*ACLU v. Reno*, 929 F. Supp. 824 at 995, 1996). In his opinion, the Government had assumed that "what is good for broadcasting is good for the Internet" (*ACLU v. Reno*, 929 F. Supp. 824 at 998, 1996). He refuted the Government's claim that indecent material would keep people away from the Internet. He predicted that as adults find their speech prohibited, the "worldwide dialogue that is the strength and signal achievement of the medium" will diminish (*ACLU v. Reno*, 929 F. Supp. 824 at 1013, 1996). He concluded that the "CDA will, without doubt, undermine the substantive, speech-enhancing benefits that have flowed from the Internet" (*ACLU v. Reno*, 929 F. Supp. 824 at 1011, 1996).

In light of this decision, the Government appealed the case to the Supreme Court. The two sides had their day in court on March 19, 1997.

B. The Supreme Court

The Supreme Court decided the case on June 26, 1997. With a 7-2 majority, the Court found the Communications Decency Act in violation of the First Amendment. The Court recognized the "legitimacy and importance of the congressional goal of protecting children from harmful materials," but could not ignore the problems inherent in the Act (*Reno v. ACLU*, 521 U.S. 844 at 854, 1997). Because *Reno v. ACLU* is the first Internet case to have reached the Supreme Court, a careful examination of the reasoning behind the Court's decision is warranted. Our legal system will face many more Internet cases and the precedents set in *Reno v. ACLU* will guide future decisions. Communications professionals should be aware of the implications of this case.

The oral argument for *Reno v. ACLU* took place on March 19, 1997. Seth Waxman, deputy solicitor general, represented the appellants, while Bruce Ennis argued on behalf of the appellees. During Waxman's presentation, the justices questioned him in detail about the cost of implementing an age-verification system on a website. Waxman admitted that "if people like you or I . . . or nonprofit organizations wanted to create their own adult verification system it would be unduly expensive" (Oral Arguments). They also spent time discussing hypothetical situations in which the CDA could be used, such as teenagers discussing their sexual experiences via e-mail, the *Carnegie Library* displaying its card catalogue on-line, and parents allowing their children to view indecent material on a home computer. In many of the hypotheticals, Waxman asserted that the courts could construe the Act very narrowly in order to prevent the prosecution of parents, librarians, or teachers. He also urged the Court to use the Act's severability clause to invalidate only those portions that were considered unconstitutional while preserving the rest.

In his argument, Ennis focused on the impossibility of verifying the age of people using listservs, newsgroups, and chat rooms, which are interactive and spontaneous forms of communication. He stated that the only type of communication in cyberspace that could use age-verification systems is the World Wide Web, and even then the technology is prohibitively expensive for most site operators. Justice Scalia pointed out that the Court has upheld broadcast and print laws that prohibit dissemination of indecent speech, either by requiring prohibitively expensive equipment or regulating the location of distribution. Ennis maintained that parents can effectively control their children's Internet access through blocking software. He pointed out that these forms of parental control are more effective than any that are available for broadcast television, cable, or telephone.

In their questioning of both lawyers, the justices were interested in a few key issues. First, why is the Internet any different from other forms of communication? Justice O'Connor likened the Internet to a "street corner or a park" (Oral Arguments). Justice Breyer said, "The Internet is rather like the telephone." Second, just how prohibitive are the costs of Internet age-verification systems? Chief Justice Rehnquist stated that the terms Ennis was using ("prohibitively expensive" and "economically prohibitive") were value-laden terms and needed more explanation than had been given previously. Justice Scalia wanted to know if the benefits gained through the age-verification systems were more important than the speech that would be censored. Third, are there effective alternate means of keeping minors away from indecent material? Chief Justice Rehnquist was intrigued by the appellees' assertion that there existed "a less restrictive, more effective means" of keeping children away from indecent Internet content. Justice Scalia wondered if the CDA might be constitutional at some time in the future, when technology had changed. Fourth, could the CDA be more narrowly tailored by severing certain parts that are deemed unconstitutional? Justice Breyer brought up the possibility of limiting the Act to punish "people who make significant amounts of money out of selling pornography across the Internet." Chief Justice Rehnquist argued that the term "patently offensive" could be defined more narrowly, thus saving the Act.

A review of the defenses the Government used in its case is also important for a complete understanding of the issues surrounding Internet regulation. As will be discussed in Part III, Congress has already drafted new legislation to replace the defeated CDA. The arguments used in the *Reno v. ACLU* case provide insight into the Government's tactics and reasoning.

The Government relied upon precedents set in three cases: *Ginsberg v. New York*, *FCC v. Pacifica Foundation*, and *Renton v. Playtime Theatres, Inc.* In *Ginsberg*, the Supreme Court upheld the constitutionality of a New York statute that outlawed selling obscene material to minors, even if the material was not considered obscene to adults. In effect, the Court said that the same material can be obscene to one age and not to another. The Court also recognized the government's interest in the well-being of its youth (390 U.S. 629 at 639). In *Reno v. ACLU*, the Government argued that the *Ginsberg* precedent allowed the CDA to restrict minors' access to materials that were constitutionally protected for adults.

Pacifica dealt with an indecent monologue broadcast on the radio during the afternoon, a time when children were likely to hear it. The Court established that the context of speech could render it obscene, and therefore unprotected by the First Amendment (438 U.S. 726 at 735). The Government argued that indecent content was available on the Internet 24 hours a day, thus its context rendered the material obscene and unprotected by the constitution.

In *Renton*, the Court upheld a zoning ordinance that kept adult movie theaters out of residential neighborhoods. Because the ordinance sought to prevent the secondary effects of the theaters--lowered property values and crime--rather than the actual dissemination of the indecent material, the Court felt that it did not abridge the First Amendment (475 U.S. 41 at 49). The Government contended that the CDA was a type of "cyberzoning" law for the Internet, and thus should be upheld by the Court.

The Government also set forth three other arguments for the constitutionality of the CDA: 1) The CDA leaves intact a wide variety of "alternative channels" for the restricted speech; 2) The "knowledge" and "specific person" requirements narrowly define the Act because it would only punish those who purposively transmitted indecent material to a minor; 3) Material having scientific, educational, or other socially redeeming values fall outside of the CDA's restrictions (*Reno v. ACLU*, 521 U.S. 844 at 906, 1997).

The Government's choice of cases and arguments did not convince the Supreme Court of the constitutionality of the CDA. Writing for the Court, Justice Stevens spelled out why each of the precedents and arguments did not apply to the Internet. Concerning the *Ginsberg* precedent, the Court stated that the New York statute was much narrower than the CDA for four reasons: it did not prohibit parents from buying obscene materials for their children; it applied only to commercial transactions; it was limited to material with no socially redeeming qualities; and it applied only to persons under 17 years of age. In contrast, the CDA does not allow for parental discretion, does not limit itself to commercial sites, does not define "indecent" and "patently offensive" materials as socially unredeeming, and applies to persons under the age of 18, thus adding an additional year of restrictions (*Reno v. ACLU*, 521 U.S. 844 at 906-909, 1997).

The Court explained that the *Pacifica* precedent differed from the CDA in several important ways. First, the Pacifica ruling applied only to the time of the indecent broadcast, while the CDA is concerned with indecent material itself. Second, the Federal Communications Commission, a body with a long history of dealing with broadcast issues, created the sanctions placed on the Pacifica Foundation. The CDA, on the other hand, was written by Congress, which has had no previous legislative experience with the Internet. Third, radio is a very different medium from the Internet. There is a much higher chance of a minor's coming upon an indecent broadcast by accident than coming upon indecent material on the Internet. Internet users must take a series of affirmative steps to access material. And finally, the ruling in *Pacifica* was not punitive, as are the punishments in the CDA.

The justices seemed especially perplexed at the reasoning behind the use of the *Renton* case in the Government's defense. The *Renton* decision applied to a specific type of residential area, while the CDA sought to regulate the entire Internet. Additionally, the *Renton* ruling sought to protect neighborhoods from the secondary effects of indecent speech. The CDA was concerned with protecting minors from the primary effects of "indecent" and "patently offensive" speech.

The Court also denied the validity of the Government's three other arguments. The Court deemed unpersuasive the Government's contention that the CDA left open a wide variety of alternative channels of communication for persons wishing to access indecent material on the Internet. In writing for the Court, Justice Stevens asserted that "the CDA regulates speech on the basis of its content. A 'time, place, and manner' analysis is therefore inapplicable" (*Reno v. ACLU*, 521 U.S. 844 at 906, 1997). He also stated that the prohibitive cost of the necessary age-verification systems would have the same effect as telling someone that they could not publish leaflets, but could print a book. The Court also said that it wold be impossible to enforce the CDA because "even the strongest reading of the 'specific person' requirement would confer broad powers of censorship" (*Reno v. ACLU*, 521 U.S. 844 at 908, 1997). Finally, the Court found no textual support for the Government's claim that the CDA would not be used to prosecute content providers whose material had "scientific, educational, or other redeeming social value" (*Reno v. ACLU*, 521 U.S. 844 at 908, 1997).

The Supreme Court agreed with the District Court's reasoning in regard to the Government's significant interests in the Communications Decency Act. In answer to the argument that offensive material is driving away potential Internet users, the Supreme Court stated that "the dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention" (*Reno v. ACLU*, 521 U.S. 844 at 916, 1997). The Court also said that the Government's interest in protecting minors from "indecent" and "patently offensive" content had to be balanced with the loss of First Amendment freedoms. In his opinion, Justice Stevens stated, "The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship" (*Reno v. ACLU*, 521 U.S. 844 at 917, 1997). A 7-2 majority affirmed the judgement of the District Court and deemed the Communications Decency Act unconstitutional.

Justice O'Connor, joined by Chief Justice Rehnquist, made up the dissenting minority in *Reno v. ACLU*. They concurred in part and dissented in part to the majority's decision. In writing for the minority, Justice O'Connor asserted that while the constitutionality of the CDA as a zoning law could not be upheld because it would unnecessarily restrict the First Amendment rights of adults, she did feel that the "indecency transmission" and "specific persons" provisions could be upheld insofar as they applied to Internet communications in which the sender knew that all recipients were minors. Therefore, she did not agree that the CDA was unconstitutional on its face (*Reno v. ACLU*, 521 U.S. 844 at 935, 1997).

PART III: The Future

A. Implications for Communicators

Free speech advocates celebrated the Supreme Court's decision in *Reno v. ACLU* as a triumph of the First Amendment. Bruce Ennis, the lead lawyer for the appellees, called the decision a "legal birth certificate for the Internet" (Levy, 1997). At a rally held in San Francisco on the day of the decision, a lawyer for the Electronic Frontier Foundation, one of the appellees in the case, proclaimed, "Let today be the first day of a new American Revolution--a Digital American Revolution!" (Quittner, 1997). The text of the Court's opinion was available on-line minutes after it was released and the audio portion of an ACLU news conference was broadcast over the Internet (Quittner, 1997).

Aside from the First Amendment protection the Supreme Court granted to the Internet, free-speech advocates viewed *Reno v. ACLU* as a turning point for the Court in another way. Many Court observers had feared that the justices' lack of computer savvy might prevent them from understanding the true nature of the issues involved in the case. They had reason to fear because the justices had shown great resistance to new technology. The Supreme Court has no official website, bars television from the courtroom, still hands out quill pens to lawyers, and Justice Souter won't even allow personal computers in his chamber. In the words of one reporter, writing before the oral arguments, "The future of the Internet is in the hands of a Supreme Court that revels in the past" (Mauro, March 1997).

The justices realized that their lack of knowledge would inhibit their ability to make a fair decision. Justice Souter had written earlier, "In my ignorance, I have to accept the real possibility that if we had to decide today just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong" (Mauro, December 1997). But by the time the Court heard *Reno v. ACLU*, they had overcome their ignorance. During questioning, Justice O'Connor brought up the new GCI script technology, which allows website providers to determine the ages of users, and Justice Stevens, the oldest member of the Court at 76 years, asked knowledgeable questions about tagging mechanisms (Official Transcript). As can be seen in their written opinion, the justices had carefully studied the information the District Court had gathered about the nature of the Internet. They also had read other scholarly opinions on the medium, such as "Reading the Constitution in Cyberspace," an essay by Havard law professor Lawrence Lessig (*Reno v. ACLU*, 521 U.S. 844 at 923, 1997). The Supreme Court brought itself into the computer age by necessity, and is now ready for the onslaught of Internet-related cases that are sure to come before it in the near future. Future parties in Internet cases can be assured that the Court will have an understanding of the issues surrounding this new medium.

While the plaintiffs and their supporters clearly had much to celebrate, the case was not a clear-cut victory for the future of the Internet. The Court, in its focus on the vague and sweeping nature of the CDA's language, left open the possibility that a more narrowly tailored law could pass constitutional muster. The justices also recognized that the government has a compelling interest in protecting children from obscene material on the Internet, but felt that the CDA was far too restrictive on protected adult speech. CDA supporters are using the Court's objections as a guide in formulating new legislation to regulate the Internet. In the words of Bob Flores, senior counsel of the National Law

Center for Children and Families, "The opinion gives us a good road map to what the courts will allow" (Quittner, 1997).

B. New Federal Internet Legislation

Congress has already put these lessons to use in creating the Child On-line Protection Act (COPA). Widely known as "Son of CDA" or "CDA II," the bill was signed into law by President Clinton on October 21, 1998 (Raysman and Brown, 1998). Rep. Michael Oxley (R-Ohio), COPA's sponsor, "read that (Supreme Court) opinion dozens upon dozens of times" in an effort to create a law that would pass constitutional muster (Albiniak, 1998).

COPA is a much more narrowly tailored piece of legislation than the CDA. It reads in part:

> "Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than six months, or both" (47 U.S.C. 231).

According to Congress, a person who communicates for "commercial purposes" is defined as anyone who "is engaged in the business of making such communication" (47 U.S.C. 231). Private Internet users are not affected by COPA, unlike the CDA. Additionally, COPA defines minors as anyone under 17 years of age, whereas those under 18 were considered minors under the provisions of the CDA.

The major argument against the CDA was the vague nature of the terms "indecent" and "patently offensive," as well as the broad prohibition against picturing or discussing "sexual or excretory organs." The courts were also concerned with the lack of exceptions for socially redeeming material, such as art or educational information. In COPA, commercial content providers are prohibited from:

> "depict[ing], describ[ing], or represent[ing], in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and taken as a whole, lacks serious literary, artistic, political, or scientific value for minors" (47 U.S.C. 231).

COPA also includes a provision exempting content carriers, such as American Online or Netscape, as long as they have not altered the content of the indecent communication. Indecent sites that make a "good-faith effort" to restrict minors' access through the use of an adult access code, credit card verification, or other age verification techniques have an affirmative defense against COPA's penalties. Additionally, the Act places restrictions on the type of personal information website operators can collect during age-verification procedures and requires Internet providers to notify customers of the existence of parental control devices that can restrict access to indecent and obscene sites. The Act also established the Commission on Online Child Protection, which will explore a wide variety of methods to restrict minors' access to harmful Internet materials (47 U.S.C. 231).

Despite the lessons from CDA, the Child On-line Protection Act has already been challenged in court. On October 22, 1998, one day after President Clinton signed COPA into law, a coalition of civil liberties groups and website providers filed suit in a federal district court in Philadelphia in order to enjoin enforcement of COPA (Sutin and Goldberg, 1998). The ACLU and other plaintiffs had three complaints about COPA: 1) It burdens speech that is constitutionally protected for adults; 2) It violates the First Amendment rights of minors; 3) It is unconstitutionally vague under the First and Fifth Amendments (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 745, 1999). The defendant claimed that COPA was narrowly tailored "to the government's compelling interest in protecting minors from harmful materials" (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 746, 1999). Additionally, the defendant argued that the Act does not prohibit adults from accessing indecent material, contains affirmative defenses, targets only commercial pornographers, and would not apply to the plaintiffs' websites.

On November 20, 1998, District Judge Lowell Reed issued a temporary restraining order because the plaintiffs were able to prove the following: a likelihood of success on the merits of their case, irreparable harm to themselves if the Act were allowed to be enforced, less harm to the defendant if the injunction were issued than to the plaintiffs if the injunction were not issued, and public interest (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 754, 1999). A hearing was then held to determine the constitutionality of COPA. The district court heard five days of testimony and one day of arguments, and received briefs, expert reports, and documentary evidence from each side. On January 27, 1999, Judge Reed ended the hearing by listening to answers to 19 questions he issued to both sides of the case. He asked both sides to give their views on the wording of the statute, its constitutionality and scope, as well as explain technical facets of the measure relating to the World Wide Web (Loviglio, 1999).

On February 1, 1999, Judge Reed released his written opinion on the case. In it he reviewed facts about the nature of the Internet, as well as arguments and expert testimonies from both sides. In his final decision, Judge Reed balanced the "potential harm to the parties" (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 809, 1999). He concluded "the harm to plaintiffs from the infringement of their rights under the First Amendment clearly outweighs any purported interest of the defendant" (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 809, 1999).

Despite ruling to preliminarily enjoin the government from enforcing COPA, Judge Reed expressed regret at his decision. He stated, "The protection of children from access to harmful to minors materials on the Web...particularly resonates with the Court. This Court . . . would like to see the efforts of Congress to protect children from harmful material on the Internet to ultimately succeed" [stet] (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 810, 1999). He noted that "perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection" " (*ACLU v. Reno*, 1999 U.S. Dist. LEXIS 735 at 812, 1999). The government now has the choice to go to trial or to appeal the preliminary injunction to the Third Circuit U.S. Court of Appeals. Analysts predict that whatever decision the government makes, the case is sure to go before the Supreme Court (Kraw, 1999).

Debate about the Internet, the First Amendment, and indecent speech will go on as long as the medium is in existence. The body of legislative and case laws governing print, broadcast, and telephones is still evolving, even though these media have been around for many years. The Internet issue is especially urgent now because of the current lack of restrictions on the medium and the general public's growing awareness of, and access to, its content. Because of the interest in establishing some rules for the Internet by the public, the courts, and the government, it is likely that some sort of legislation will be passed in the future. Just how far that legislation will go in restricting the First Amendment rights of Internet content providers and users remains to be seen. But, as can be seen through the cases detailed in this paper, efforts by the ACLU and others ensure that the wishes of the majority will not completely drown out the voices of the minority.

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Law

Actual Malice:

How Badly Does A Journalist Have To Behave For A Politician To Win A Libel Suit?

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Paper Presented
At The
AEJMC 1999 National Convention
New Orleans
August 4-7, 1999

Abstract

In *New York Times v. Sullivan,* the U.S. Supreme Court stood traditional libel law on its head and established the doctrine of actual malice. Almost a decade has passed since the Court last visited the concept. Subsequently, although the Court specified that common law malice was not an element of actual malice, lower courts have continued to consider ill will or harmful intent as a key factor in actual malice determinations.

Through much of American history, the odds of winning libel lawsuits against the media were heavily in favor of plaintiffs.[1] But in 1964, in *New York Times v. Sullivan*, the U.S. Supreme Court began constitutionalizing the law of libel and, in the process, stood libel law on its head, declaring that a public official must prove actual malice – knowledge of falsity or reckless disregard for truth – to sustain a libel claim against a media organization.[2] Twenty-five years later, in *Harte-Hanks Communications, Inc. v Connaughton*, the Court issued its most detailed analysis of the journalistic conduct necessary to sustain a holding of actual malice in a case involving a political candidate or public official.[3] *Connaughton* also was the first time that the post-*Sullivan* Court upheld a politician's libel claim against a newspaper.[4] The two cases, in a sense, serve as bookends around the Court's grappling with issues at the core of protected speech: Given the high premium placed on political speech, when does the speaker's conduct become so egregious that it removes the protection? The Supreme Court has not revisited a public official libel case since *Connaughton*, when it set forth its framework regarding such behavior. But in the ensuing decade, lower courts have been filling in the picture, adding details about types of journalistic lapses sufficient to allow a public official plaintiff to recover damages. The purpose of this study is to examine lower court rulings in cases involving media organizations and politicians, both public officials and candidates, since

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[1] Norman L. Rosenberg, *Protecting the Best Men* 1-15 (1986).
[2] 376 U.S. 276, 283 (1964).
[3] 491 U.S. 657 (1989).
[4] Paul D. Driscoll & Kyu Ho Youm, Harte-Hanks Communications v. Connaughton: *The U.S. Supreme Court's Application of the Actual Malice Rule*, Comm. & the Law, 1993, 57. See also, Sujyot S. Patel, "Harte-Hanks Communications, Inc. v. Connaughton: *The Application of the* New York Times *Standard*, 16 Ohio N.U.L. Rev. 725 (1989).

Connaughton and to analyze what types of journalistic behavior have been ruled to rise to – or perhaps sink to – *New York Times* "actual malice."[5]

Background

When *New York Times v. Sullivan* came before the Supreme Court for decision, the law appeared to be solidly against the newspaper.[6] The "advertorial" at issue in the case clearly contained errors, though they would later be viewed as minor.[7] Under the strict liability standards of libel law in 1964, the Alabama jury could have found that the newspaper committed libel even if the trial of the case had not been a racist circus with intense local pressure on the jurors.[8] Indeed, the Alabama Supreme Court did not flinch in affirming the verdict.[9] But the U.S. Supreme Court not only overturned the libel verdict against the *New York Times*, it also set a high new bar for public official libel plaintiffs to leap over if they were to collect damages. The court ruled that L.B. Sullivan, a Montgomery, Ala., commissioner in charge of the police department, would have had to prove actual malice in order to sustain his libel claim against the *New York Times*.[10]

The court issued a conceptual definition of actual malice: knowledge of falsity or reckless disregard for truth.[11] Justice William Brennan also enumerated some factors the Court considered when deciding that the *Times* had not committed it: that the appropriate corporate officer believed the advertisement at issue was "substantially correct;" that neither a failure to retract nor failure to check its own editorial files against the advertisement for mistakes did not rise to the actual malice standard.[12]

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[5] Obviously, the area of public figure lawsuits is also a fruitful area for inquiry. However, that is not the purpose of this study.

[6] Rodney Smolla, *Suing the Press*, 1-52 (1986).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 376 U.S. at 276.

[11] *Id.* at 283.

Later in the same year, the Court revisited the "reckless disregard" issue. A criminal libel case not involving a news organization, *Garrison v. Louisiana,* established that reckless disregard meant a "high degree of awareness of probable falsity" of the publication.[13] Subsequently, in *St. Amant v. Thompson,*[14] the Court elaborated further: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[15] The court also identified circumstances under which actual malice might be found:

> Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, the recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.[16]

When the Court was next asked to look at a libel verdict in a case involving a public official, it declined, provoking a bitter dissent from the libertarian justices, Hugo Black and William O. Douglas.[17] Ralph Ginzburg, publisher of numerous "scandalmonger" magazines, wrote that the 1964 Republican presidential nominee, Sen. Barry Goldwater, was mentally unfit to hold public office. Goldwater sued. A jury awarded him $1 in actual damages and $75,000 in punitive damages. Ginzburg eventually appealed to the U.S. Supreme Court, which refused in 1970 to grant *certiorari.*[18] Black, ever courtly and courteous, gave vent to his outrage:

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[12] *Id.* at 286-7.
[13] Garrison v. Louisiana, 379 U.S. 64 at 74 (1964).
[14] 390 U.S. 727 (1968).
[15] *Id.* at 731.
[16] *Id.*
[17] Ginzburg v. Goldwater, 396 U.S. 1049; 90 S.Ct. 701 at 704 (1970) *cert. denied.*

> "The public has an unqualified right to have the character and fitness of anyone who aspires to the Presidency held up for the closest scrutiny. Extravagant, reckless statements and even claims which may not be true seem to be inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of a man who would be president."[19]

The Supreme Court again refused to hear an appeal from a West Virginia lawsuit involving politicians and media in 1975. In *Sprouse v. Clay Communication, Inc.,*[20] the state supreme court upheld a $250,000 award for damages against the *Charleston Daily Mail* for libeling an unsuccessful candidate for governor through "misleading words in oversized headlines."[21] The newspaper's editors had used words such as "land grab," "dummy firms," and "bonanza," which the court found to imply illegal conduct (while the candidate's transgressions involved only violations of business ethics).[22]

Then came the Connaughton case from Ohio, where Daniel Connaughton had tried to unseat a municipal court judge whose re-election was backed by the local newspaper, the *Hamilton County Journal News.*[23] The testimony revealed that the newspaper had relied on a highly questionable source and had failed to investigate contradictions before publishing a front-page story charging that Connaughton had planned blackmail and promised favors to two women in exchange for their help in smearing an opponent.[24] The paper failed to interview a key witness.[25] Reporters failed to listen to a tape, supplied by Connaughton, that undermined the accusations against him.[26] A jury's finding of actual malice and a $200,000 verdict for Connaughton was upheld by the U.S. Court of Appeals for the 2nd Circuit.[27] The Supreme Court granted *certiorari.*

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[18] *Id.*

[19] *Id.* at 704.

[20] 211 S.E. 2d 674, 1 Med. L. Rptr. (BNA) 1695 (W.Va. 1975).

[21] Donald M. Gillmor, Jerome A. Barron, Todd F. Simon, Herbert A. Terry, *Mass Communication Law Cases and Comment* 174 (5th ed. 1990).

[22] Rosenberg, *supra,* note 1 at 250.

[23] *Connaughton, supra,* note 3 at 660.

[24] *Id.* at 693.

Among the more egregious journalists' actions cited in the Court's review were the reliance on the questionable source; failing to interview the key source, failing to listen to Connaughton's tape recording, ignoring both Connaughton's denials and the improbability of the accusation against him. Justice John Paul Stevens wrote that the evidence "when reviewed in its entirety, is 'unmistakably' sufficient to support a finding of actual malice."[28] The courts may have established a high bar for *New York Times* "actual malice," but the Ohio newspaper managed to vault over it.

Literature Review

Entire forests have undoubtedly been felled to supply paper for the books, scholarly journal articles and other discussions of libel law in America since the *Sullivan* decision. But any contemporary evaluation should start with the University of Iowa's comprehensive evaluation of libel cases between 1974 and 1984.[29]

The authors of the Iowa study found that lawsuits by public officials against media corporations accounted for 24 percent of all complaints against news organizations between 1974 and 1984.[30] Of the public official lawsuits that had been resolved by the time the study was published, 11 percent had been won by public officials and 89 percent by the media. A quarter of the cases were still pending.[31] The number of such suits, 118,

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[25] *Id.* at 682.
[26] *Id.* at 683.
[27] *Id.* at 661.
[28] *Id.* at 693.
[29] Randall P. Bezanson, *et.al., Libel Law and the Press: Myth and Reality* (1987).
[30] *Id.* at 121.
[31] *Id.*

was not huge. However, their importance lies not in their volume but in their position at the core of First Amendment concerns.

Libel suits brought by politicians also have proven to be tougher cases for media defendants than other defamation claims. The Iowa studies showed that public officials are more prone to stick to their guns once they entertain the notion of suing. Only in 30.8 percent of public officials' suits did their lawyers discuss alternatives before going to court, compared to 75 percent of white collar private plaintiffs. The alternatives discussed with public officials were settlement in 41.7 percent of cases and the possibility that a lawsuit was unnecessary in 58.3 percent of cases.[32]

The studies also attempted to gauge the strength of the public officials' claims, and overwhelmingly, they were viewed as being of little consequence. The studies ranked 83 percent of public officials' claims as petty and only 17 percent as non-petty.[33] In 92.6 percent of the public official cases, the focus of the alleged libel was the plaintiff's public or political activities and in 7.4 percent of the cases it was on criminal activities.[34]

However, the numbers do not paint a full picture of libel's impact on news organizations. Research in trade publications has revealed that many more suits are filed than reach the appellate level. But even trade publications do not touch the times when prominent political figures use the threat of a libel suit "in hopes of influencing future journalistic treatment of their activities."[35]

Research on the impact of libel law on news organizations is mixed. One scholar found that the Supreme Court's libel decisions had created a "pattern of increased caution and responsibility on the part of newspaper editors," but nothing that could be described as a "chilling effect."[36] More recently, American and British scholars joined forces to explore the effects of differing libel laws in the two countries, finding a much greater reluctance by British editors to publish complex public official investigative stories comparable to the American Watergate scandal.[37] In contrast, they found that U.S. editors are far less concerned about being sued.[38]

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[32] *Id.* at 63.
[33] *Id.* at 111.
[34] *Id.* at 14.
[35] Rosenberg, *supra,* note 1 at 207.

Others have argued that *Sullivan* and its descendants have produced an imbalance between First Amendment freedom and the individual's right to be secure in his/her reputation. One legal scholar contended that the decisions created "a domain in which the media operates[sic] virtually unchecked."[39] Because the press is not held to a truth standard, the public is frequently misinformed, this line of reasoning goes. The author of this work conceded that most news organizations follow professional standards but argued that the excesses of prominent news media have had a detrimental effect on criminal and civil trials and on the political confirmation process.[40] Another law scholar argued that the courts' *de novo* review of libel cases had robbed defamation plaintiffs of their constitutional right to a jury trial.[41]

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[36] Brian Hawley, *New York Times v. Sullivan and its Progeny: Was There a "Chilling Effect?* paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (1986).

[37] Russell L. Weaver & Geoffrey Bennett, *Is The New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 La. L.Rev. 1153, 1174 (1993).

[38] *Id.* at 1183.

[39] Philip L. Judy, *Comment: The First Amendment Watchdog Has a Flea Problem*, 26 Cap. U.L. Rev. 541 (1997).

[40] *Id.*at 593.

[41] Marc E. Sorini, *Factual Malice: Rediscovering the Seventh Amendment in Public Person Libel Cases*, 82 Geo. L.J. 563 (1993).

In a thoughtful critique, addressing the broader category of public figures, attorney Edward T. Fenno has suggested that the actual malice standard is a failure because it emphasizes a publisher's subjective belief.[42] Fenno argued:

> Since many of these poorly substantiated publications turn out to be untrue, the 'race' (to the bottom) leads to three important harms to society. First, large numbers of innocent persons are horribly libeled with no chance at either financial compensation or a re-establishment of their reputation. Second, the marketplace of ideas becomes so diluted with factually false information that consumers of information don't know what to believe. Third, publishers who carefully investigate the truth of their information cannot compete financially with the careless publishers of false information.[43]

Concerns over the difficulty in protecting reputation under the actual malice proof standard have given rise to a wide range of reform proposals over the years, many from lawyers, many of them advocating a lower standard of liability that would allow plaintiffs a better chance at recovering damages.[44]

Understandably, the view from the lawyers' side of the fence and the journalists' side of the fence is somewhat different. The authors of the University of Iowa studies, along with colleagues, suggested in 1994 that the problem with the actual malice standard was that it was allowing judges to dictate professional norms for journalism.[45] "The *Sullivan* rule has spawned a *de facto* set of judge-made standards that covers all aspects of journalistic behavior. These standards include the use of sources, the quality of writing, the demand for corroboration, the duties of editorial supervision, and the use of quotations."[46]

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[42] Edward T. Fenno, *Public Figure Libel: The Premium on Ignorance and the Race to the Bottom*, 4 S.Cal. Interdis. L.J. 253, 254 (1995).

[43] *Id.* at 255.

[44] *See, e.g.*, Susan M. Gilles, *Taking First Amendment Procedure Seriously* 58 Ohio St. L.J. 1753 (1998); John L. Diamond, *Rethinking Media Liability for Defamation of Public Figures*, 5 Cornell J.L. & Pub. Pol'y 189 (1996); Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation*, 72 N.C. L.Rev., 193 (1994); Mark A. Franklin *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. Rev. 1 (1983); Mark A. Franklin, *A Declaratory Judgment Alternative to Current Libel Law*, 74 Cal. L. Rev. 809 (1986); David A. Barrett, *Declaratory Judgments For Libel*, 74 Cal. L. Rev. 847 (1986); Pierre N. Leval, *The No-Money, No-Fault Libel Suit*, 101 Harv. L. Rev. 1287 1287 (1988).

The more concrete concern of the media, of course, is money. The Libel Defense Resource Center, which gathers data on libel trials and damage awards, reported in early 1994 that the average damage award returned by juries against the media during the two preceding years topped $1 million.[47] That represented a sharp drop from the average 1991-92 award of $8 million[48] Still, the consequences for individual media organizations can be high. The costs of appealing a multi-million-dollar libel verdict forced the *Alton Telegraph,* a small downstate Illinois newspaper, onto the auction block.[49]

Much of the literature about libel law focuses, as it should, on the meaning of court decisions. Comparatively little has focused on the conduct, behavior or actions of journalists except as incidental factors to the legal analysis. There are two notable exceptions, primarily W. Wat Hopkins' *Actual Malice: Twenty-Five Years after* Times v. Sullivan, in which Hopkins not only explored the history and theory of libel law but also addressed how lower courts applied the rules set forth in *Sullivan* and its offspring.[50] He found that while publishers rarely admitted knowledge of falsity, such instances did occur.[51] He noted more instances in which publishers were in possession of information that could have and, perhaps, should have caused them to doubt the truth of what they

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[45] Brian C. Murchison, *et.al., Sullivan's Paradox: The Emergence of Judicial Standards of Journalism,* 73 N.C.L.Rev. 7 (1994).
[46] *Id.* at 12.
[47] 1 LDRC Bull., Jan. 31, 1994.
[48] Kent R. Middleton, *et.al., The Law of Public Communication* 75 (1997).
[49] Rodney A. Smolla, *Proposal for the Reform of Libel Law: The Report of the Libel Reform Project of the Annenberg Washington Program* 9 (1988).
[50] W. Wat Hopkins, *Actual Malice: Twenty-Five Years after Times v. Sullivan* 132 (1989).
[51] *Id.* at 136.

were printing.[52] He also listed a broad range of behaviors that had been interpreted as reckless disregard for truth.[53]

About the time Watkins' book was published, Ann L. Plamondon wrote a less extensive analysis of how the courts were applying the actual malice standard.[54] She found a trend in which courts focused on dubious sources and improbable statements, plus the extent to which the media organization tried to verify information, as factors in gauging actual malice. In a sense, the combination of Hopkins' and Plamondon's efforts perceptively predicted what the Court's ruling would be in *Connaughton*.

In the years since the Court's most recent pronouncement on libel, free press advocates have continued to worry about the impact of libel suits, not just in terms of cost but in terms of psychological pressure on editors and reporters.[55] Press critics, on the other hand, see a news media establishment with the "ability to publish inaccurate, if not patently false, stories without being subject to effective remedial measures.[56] Almost 10 years of post-*Connaughton* applications by lower courts fill the appellate troughs. A 1997 study examined how juries have been applying the negligence standard to private person plaintiffs in recent years.[57] It found that although definitions differ from state to state, because of hostility toward media defendants, juries will slip back toward strict liability unless judges are rigorous in their requirements.[58] However, no scholarly analysis of journalist actions and actual malice in public official cases since *Connaughton* could be located.

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[52] *Id.* at 143.
[53] *Id.* at 146-150.
[54] Ann L. Plamondon, *An Epistemological Analysis of the Concept of Actual Malice*, *Comm. & L.* 44-45, (1989).
[55] Driscoll, *supra* note 4 at 58.
[56] Judy, *supra* note 38 at 581.
[57] Danno Farrington, *Evidence? We Don't Need No Evidence! Proof of Negligence in Private Plaintiff Defamation Suits*, 21 Comm. & L. 9 (1997).
[58] *Id.* at 52.

Research Questions and Methodology

This study is designed to examine what journalistic behavior has constituted actual malice in lower court decisions after *Connaughton*. To accomplish that purpose, the following research questions will be addressed:

1. What types of actions by journalists have been adjudged actual malice by the courts?
2. What types of actions have been found to approach the actual malice standard without reaching it?
3. In what type of instances have courts ruled that juries must make the decision?
4. In what sort of circumstances was no actual malice found?

Lexis-Nexis online was used to isolate dozens of cases in which public officials sued media plaintiffs since the ruling in *Connaughton*. The search terms were "public official" and "actual malice." The search covered the federal courts at all levels and all 50 state courts, plus territories. Every case that named a media corporation or parent company was pulled for full scrutiny. Further, a spot check of every fifth case in which only personal names appeared was used to test for circumstances in which the lead defendant might be a named person instead of a media organization. This produced no additional cases. As a backup to ensure further against missed cases, the InfoTrac and LegalTrac databases also were searched for "actual malice." No additional cases emerged.

Cases decided on the basis of public figure plaintiffs were then excluded, along with those in which the plaintiff was ruled to be a private person over the objections of the media defendant. Additionally, purely procedural rulings that did not involve a determination of actual malice liability were excluded.

The Landscape: Public Officials suing Media Defendants

Of the sixty cases remaining after all exclusions, the courts found actual malice in three, or 5 percent. The courts were highly critical of media performance but did not find actual malice in one other case, or 1.7 percent of the total. In ten cases, or 16.7 percent, the judges said maybe: the facts of the case required a jury's factual decision on a crucial aspect of actual malice. The courts ruled in forty-six of the cases, 76.7 percent, that the media had not reached the actual malice standard. In twenty-two of these, courts disagreed at some point in the review process, typically with an appellate court overturning a lower court's refusal to enter summary judgment. The slightly larger block of "no" cases produced no disagreement among the courts. Trial judges either issued summary judgment or dismissed the lawsuits by other mechanisms, and their rulings were upheld on appeal.

Yes, Actual Malice

Interestingly, in the three cases in which the courts found actual malice, two of the plaintiffs were prosecutors and the third was a clerk of court. The factual circumstances of the cases differed, of course, but some factors were common to two or more: journalists' blatant conflicts of interest, outright threats to "get" the plaintiff or "gotcha" references in notes, and judges' perceptions that journalists indulged in self-serving lies.

The granddaddy of the cases, litigated for 23 years, was filed by Richard A. Sprague, Philadelphia's first assistant district attorney, against the *Philadelphia Inquirer*.[59] At issue was a series of stories and editorials, starting in the spring of 1973, that accused Sprague of illegal wiretapping and of quashing a case as a favor to the state police commissioner.[60] The reporter at the heart of the case was a troubled young man named Greg Walter, whom Sprague had successfully prosecuted on criminal wiretapping charges the preceding year, when Walter had been a reporter for *The Philadelphia Evening Bulletin.* Walter, who was publicly known to have a severe drinking problem, suffered a mental breakdown and was hospitalized after the conviction.[61] Upon his release, Eugene L. Roberts Jr., *The Inquirer's* executive editor, hired him as a reporter.[62]

Within months, while his own wiretapping conviction was on appeal, Walter wrote a story linking Sprague to a state trooper who had been involved in illegal wiretapping.[63] Testimony later revealed that Walter made no effort to contact a state police sergeant who could have refuted the information.[64] Meanwhile, he told a friend, "I'm going to destroy (Sprague). I'm going to get him."[65] He told his editor, Roberts, "I'm going to get that son of a bitch."[66] He told his girlfriend "he was out to get Mr. Sprague, that because Mr. Sprague had successfully prosecuted him for a wiretapping charge. . . ."[67] He told others that "this would be the end to him, I'm really going to finish him."[68]

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[59] Sprague v. Philadelphia Newspapers, Inc., 27 Phila. 333 (1993).
[60] *Id.* at 335.
[61] *Id.* at 336.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

A month after the wiretapping stories, Walter began investigating a 10-year-old case in which Sprague had participated as chief of homicide for the District Attorney's Office.[69] The case involved Rocco Urella Jr., son of the Pennsylvania State Police commissioner. Urella, a medical student, went out to a bar with a classmate, Donald Scalessa, on a Saturday night. They met another young man, "Applegate," who invited them to his nearby apartment with a promise to have some girls over and continue the party.[70] Instead, Applegate propositioned them. Scalessa punched him. The medical students fled, only to learn to their horror the next day that Applegate was dead.[71] They turned themselves in to the authorities, and a series of law enforcement and judicial authorities, including Sprague, found no basis to prosecute them.[72]

Walter began checking into the Applegate death shortly after he was hired at *The Inquirer*. He insisted on interviewing Sprague about it although the prosecutor was across the state, prosecuting a high-profile murder case, the slayings of United Mine Workers leader Jack Yablonski, his wife and daughter.[73] Walter imposed a two-day deadline on Sprague for the interview.[74] Sprague protested to editor Roberts that his duties in the Yablonski case prevented him from responding within the deadline about a 10-year-old case.[75] He reminded Roberts that he had prosecuted Walter and told him that

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[67] *Id.* at 337.
[68] *Id.*
[69] *Id.* at 340.
[70] *Id.*
[71] *Id.*at 341.
[72] *Id.* at 342-345.
[73] *Id.* at 340.
[74] *Id.*
[75] *Id.*

Walter was threatening to "get" or "smear" him.[76] *The Inquirer* responded with the headline, "Sprague won't see reporters."[77]

When Walter finally wrote his story, he implied that Sprague alone had made the decision to drop charges against the medical students in order to curry favor with the head of the state police. He referred to an "official report" by Sprague that was never issued. He altered his notes to make it appear that the police chief's son had thrown the fatal punch instead of his companion. *The Inquirer* disputed the fact that the medical students had taken and passed a lie detector test.[78] Walter destroyed tapes of interviews after the story was published.[79] The court found that these actions were proof of Walter's "vendetta" and editor Roberts' "willingness to ignore the warning signs and disregard the truth."[80]

Sprague testified that after *The Inquirer* published the defamatory stories about him, he received hate mail demanding his resignation, that he was reluctantly forced to conclude that "it was impossible" for him to continue with his planned public career and that he entered private practice because of the articles.[81] He testified that he was forced to face "the anguish in my son, in my daughter...[and] in my mother and father...."[82]

Two juries found that the newspaper had libeled Sprague with actual malice. The first award in 1983 was overturned by the Pennsylvania Supreme Court in 1988. On retrial in March of 1990, a second jury awarded Sprague $2.5 million in compensatory damages and $31.5 million in punitive damages.[83] In a 144-page opinion in 1993, the trial judge refused the newspapers requests to set aside the judgments or grant a new trial.[84] "Sprague, to this point, enjoyed an unimpeachable reputation," the judge wrote. "These defamatory articles painted Sprague's reputation with a black brush, which is resistant to all erasable solvents."[85]

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[76] *Id.*
[77] *Id.*
[78] *Id.* at 344.
[79] *Id.* at 410.
[80] *Id.* at 393.
[81] *Id.* at 431.
[82] *Id.*

Upholding the enormous verdicts in favor of the prosecutor, the judge noted that four years after Sprague had filed his lawsuit, *The Inquirer* had engaged in further "outrageous conduct."[86] Sprague was hired as Chief Counsel for a special Congressional Committee investigating the assassinations of John F. Kennedy and Martin Luther King Jr.[87] The paper's editor forwarded editorials about the Applegate case to the committee. "Sprague was unable, after the editorials, to obtain the cooperation and equipment needed."[88] The congressional committee issued a vote of no confidence, resulting in Sprague's resignation."[89] "Should not a clarion cry issue to all who are so bent, that reputation is a person's most valuable asset?" the judge asked, accusing the newspaper of "insensitivity" and "inability to comprehend the gravity of their acts."[90]

A Pennsylvania Superior Court eventually reduced the $34 million verdict to $24 million.[91] The Pennsylvania Supreme Court refused to review the case,[92] and eight days before *The Inquirer* was due to ask for U.S. Supreme Court review, the case was settled by confidential agreement.[93] "We are confident that the United States Supreme Court would have ruled in our favor if it took the case, but we also are aware that the Court takes very few cases," said Robert J. Hall, *The Inquirer's* publisher. "It's been a long time since the 1970's, and it's time to move on."[94]

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[83] *Id.* at 433.
[84] *Id.* at 477.
[85] *Id.*at 436.
[86] *Id.* at 448.
[87] *Id.* at 449.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] "*Philadelphia Libel Suit Settled Out of Court,*" <http://www.kr.com/html/pr_06>
[92] *Id.*

The Kentucky courts also looked closely at a reporter's relationship with a prosecutor in upholding a finding of actual malice against *The Kentucky Post*, a newspaper circulating in the northern part of the state. Reporter Al Salvato, researching a story about teenage drug use, was ejected from a high school football game in Bellevue after allegedly trying to get some girls "to take dope with him because he was depressed."[95] He told police who responded to complaints about him that he was a reporter and that he had a judge's permission to do what he was doing, but they tossed him out anyway.[96] *The Post* subsequently published a series of stories about irregularities in the Bellevue Police Department. The state police investigated and sent a report to a local grand jury, but no indictments were returned.[97]

Shortly afterward, the newspaper began publishing editorials critical of prosecutor Louis A. Ball, and Salvato began working on a lengthy investigative report about Ball's performance in office. "Portrait of a Prosecutor" appeared with a subhead, "Lou Ball's Record Lags Behind Others." A second part prominently featured a pull-quote from a former narcotics officer: "He turns them right back, and they commit crime after crime. They couldn't have a better friend."[98]

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[93] *Id.*

[94] *Id.*

[95] Ball v. E.W. Scripps Co., 801 S.W.2d 684, 687 (1990)

[96] *Id.*

[97] *Id.*

[98] *Id.* at 686.

In reviewing Salvato's actions as he reported the stories, the Kentucky Supreme Court noted that while scrutinizing records of case dispositions, Salvato would mark "good case" in his notes whenever he found one where a felony was reduced to a misdemeanor or where a persistent felony offender charge was dismissed.[99] Salvato selectively interviewed only a few people hostile to Ball, "deliberately choosing not to interview those who could contradict their claims."[100] For example, the court found, he interviewed a convicted felon who claimed he had been forced to plead guilty but not the felon's lawyer.[101] Salvato chose to compare statistics on Ball's handling of cases to those of a prosecutor in another county, even though he knew that a different system in place there would skew the figures against Ball.[102] The newspaper ignored Ball's efforts to demonstrate that the narcotics officer being featured so prominently in the story was "totally unreliable."[103] The Court also took note of a telephone conversation in which Salvato told the prosecutor that he would be "hearing from" him, which the Court interpreted as "presumably implying a threat."[104]

A jury awarded the prosecutor $175,000 in compensatory damages but no punitive damages. The newspaper appealed to the intermediate appellate court, which, in a split decision, found no "knowledge of falsity or reckless disregard for truth."[105] But the

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[99] *Id.* at 687.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.* at 688.

[105] *Id.* at 685.

Kentucky Supreme Court, citing Salvato's conduct, reinstated the judgment and ruled that it was not excessive. The Court relied heavily on the *Connaughton* case in finding "the evidence more than sufficient to rise to the standard imposed."

The third case in which a court found actual malice started amid a hotly contested 1992 election campaign for clerk of court in Butler County, Ohio. Longtime Clerk Edward S. Robb Jr., a Republican, was heavily favored for re-election until his Democratic opponent, Mark Baden, obtained an advance copy of a state auditor's report on Robb's office and started issuing press releases. At issue was an accounting question of whether $1.4 million in "open items" was in the proper place in Robb's office. But Baden charged that Robb had "illegally squirreled away nearly 1.5 million dollars in public money that rightfully belongs to the people of Butler County."[106]

The newspaper bought into Baden's charge and wrote a story under the headline, "Audit report blasts Robb over $1.5 M." Initially, the paper's editorial response was mild: "If the allegations are true, they are serious indeed. But every indication is that the funds are strictly accounted for." But in succeeding days, the news columns continued to treat Robb's performance as bordering on criminal. The Ohio Court of Appeals called the coverage "an example of one of the worst excesses of contemporary journalism; a 'spin' put on facts to get the attention of the reader that distorts their true meaning."[107] However, the court said that the journalists' actions in reporting the stories, though sloppy and inaccurate, did not rise to actual malice.[108]

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[106] Robb. v. Lincoln Publishing (Ohio), Inc., 114 Ohio App. 3d 595, 602 (1996).
[107] *Id.* at 618.

[108] *Id.* at 619.

However, days before the election, the *Journal News* sold Baden space for a screaming, negative ad that relied heavily on the newspaper's own stories about Robb The ad, which ran for five days, tried to link Robb not only to "missing money" but also to drugs that had disappeared from the clerk's office years earlier and to the suicide of a former employee.[109] The paper's managing editor, Ozzie Kleinas, testified that he approved the ad for publication even though he had participated in discussions leading up to the editorial that stated "Every indication is that the funds are strictly accounted for."[110] Asked whether the ad was "an enormous distortion of fact designed to hurt Robb," Kleinas responded, "When you're dealing with political campaign advertising, you are not dealing with balanced truth.... You're dealing with someone who is getting as close as they can to telling a lie."

In upholding a libel verdict in Robb's favor, the Ohio Court of Appeals ruled that the ad, in effect, had called him a thief by linking the "missing" money to the earlier theft of drugs from the office. "No innocent construction is available," the Court said.[111] The court noted that the context of the statements was political advertising in the midst of a bitter election campaign in which hyperbole was inevitable. "Nevertheless, assertions that money is 'missing' connote fact, not opinion, even in so wide-open an arena as an election campaign," the court said.[112] The false statement was published with actual malice because the newspaper knew it was false, the opinion said, "the dissembling testimony of its editor notwithstanding."[113] The appellate decision upheld $15,000 in compensatory damages based on the ads and sent the case back to the trial court for reconsideration of punitive damages.[114]

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[109] *Id.* at 606.

[110] *Id.* at 609.

[111] *Id.* at 619.

[112] *Id.* at 620.

Not actual malice but "slipshod journalism"

An appellate court in one instance said that a newspaper had come very close to the actual malice line without crossing it. Again, the court scrutinized the journalist's conduct and mindset quite closely. But in this case, they gave the benefit of doubt to a rookie.

The New Jersey Supreme Court ruled in 1994 that journalists came very close to the actual malice standard without quite reaching it. In October 1990 an editor at the *Ocean County Observer* assigned an inexperienced reporter, Whit Andrews, to check out reports of possible misconduct by Seaside Heights police officers.[115] Somehow, an unsigned complaint had made its way into a file. The document wrongly accused Officer James Costello of fondling a woman while she was handcuffed during a strip-search.[116]

Andrews tried unsuccessfully to contact Costello and other town officials about the document.[117] He finally reached the town attorney, who cautioned him against writing a story based on the unsigned complaint and suggested that the reporter check with the newspaper's lawyer. Andrews responded that the paper didn't have a lawyer on staff and "were anxious to have the story printed so that they could get the story into print prior to the *Asbury Park Press* getting the story."

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[113] *Id.*

[114] *Id.* at 624.

[115] Costello v. Ocean County Observer, 136 N.J. 594, 600 (1994).

[116] *Id.* at 600.

Costello sued. The trial judge granted summary judgment, which the Appellate Division reversed. The New Jersey Supreme Court took *certiorari* to review the file. Although not excusing Andrews' lack of experience, the Court found that it was an understandable factor in his misunderstanding the legal documents involved. "Although we do not condone the erroneous reporting of information in court files, we realize that journalists are not lawyers by trade," the justices said. "Errors in reports on court proceedings are bound to occur from time to time, and the First Amendment protects those errors as long as they are not recklessly or intentionally made."[118]

However, in affirming summary judgment for the newspaper, the Supreme Court opinion issued a stern admonition: "We recognize the important role journalists play in disseminating news. We recognize that newspapers face competitive pressures to investigate stories quickly and to 'scoop' other newspapers. Nonetheless, shoddy and careless reporting that leads to the dissemination of false or misleading information is detrimental to the enlightenment of a free society. A newspaper's greatest reward is the public's trust. Defendants today narrowly escape liability, but they do not escape the loss of credibility that results from slipshod journalism."[119]

Bring on the jury

The cases that fell into the "maybe" category, requiring a jury's factual decision, also offered little consolation for people concerned about journalism behaviors. As with the earlier categories, a journalist's mindset often played a crucial role.

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[117] *Id.* at 603.
[118] *Id.* at 619.

[119] *Id.* at 620.

A Washington state television reporter, Don McGaffin, got an anonymous tip that the FBI was investigating a county prosecutor's office for irregularities in bail bonds.[120] McGaffin erroneously reported that bondsmen had contributed half of the prosecutor's campaign donations when he unseated an incumbent. McGaffin tried to reach the prosecutor, Don Herron, but failed. An assistant confirmed the existence of some type of investigation but refused to elaborate. McGaffin then stuck his face close to the assistant's, lowered his voice and said, "You will regret doing this (refusing to answer questions). I will get you. Just watch the news."[121] The Washington Supreme Court found that bondsmen had really only contributed $825 to Herron's $38,000 war chest.[122] It was for a jury to decide whether the grossly inflated figure in McGaffin's report and other factors altered the story enough to reach actual malice, the court said.[123]

When the coroner of Otter Tail County, Minnesota sued a local television station over a report criticizing her handling of an autopsy, the U.S. Court of Appeals for the Eighth Circuit said a jury should decide what weight to give the broadcaster's untruthful report that the coroner had hung up on him.[124] Combined with other statements in the TV report, a jury could conclude that the coroner was dodging questions about her professional capability, the court said.[125]

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[120] Herron v. KING Broadcasting Co., *et.al.*, 112 Wash. 2d 762, 765 (1989)
[121] *Id.* at 766.
[122] *Id.*
[123] *Id.* at 774.
[124] Michaelis v. CBS, Inc., 119 F.3d 697, 699 (1997).
[125] *Id.* at 701.

No Actual Malice

A number of the cases in which the courts found no actual malice involved public officials irked at columnists or editorial writers who criticized their performance.[126] Many lawsuits were decided by summary judgment or directed verdict, later affirmed on appeal.[127]

The appellate courts also overturned some jury awards when they found that the actual malice standard had not been met.[128] South Carolina Lt. Gov. Harvey S. Peeler sued WSPA, the main television station in his Spartanburg hometown, over an opponent's accusation that Peeler might have been complicit in forging signatures on an election petition in a State Senate race.[129] A jury awarded Peeler $50,000 in actual damages and $625,000 in punitive damages,[130] but the state Supreme Court overturned the verdict in a 4-1 decision. Putting the accuser on camera was not actual malice, the court said.[131] The lone dissenting justice found evidence of actual malice in the television station's splicing of videotape to make it appear that two men believed Peeler had a role in the forged signatures when, in fact, they were not addressing that subject.[132] The majority ruled that the practice was "sloppy journalism" but not actual malice.[133]

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[126] See, *e.g.*, Heuisler v. Phoenix Newspapers, Inc., 168 Ariz. 278 (1991); McCluen v. The Roane County Times, Inc., 936S.W.2d 936 (1996); Johnson v. Southwestern Newspapers Corporation, 855 S.W. 2d 182 (1993); Homerin v. Mid-Illinois Newspapers, 245 Ill. App. 3d 402 (1993); Deutcsh v. Birmingham Post Company, 603 S. 2d 910 (1993).

[127] See *e.g.*, Davern v. Midwest Communications, Inc., 1993 Minn. App. LEXIS 1231 (1993); Kilcoyne v. Plain Dealer Publishing Company, 112 Ohio App. 3d 229 (1996); Foley v. WCCO Television Inc., 449 N.W. 2d 497 (1989); Dowling v. Philadelphia Newspapers, Inc., 29 Phila.135 (1995); Morris v. The Dallas Morning News, Inc. 934 S.W. 2d 410 (1996); James v. San Jose Mercury News, Inc., 17 Cal. App. 4th 1 (1993); Jee v. New York Post, Inc. (1998); Mastandrea v. Lorain Journal Company, 65 Ohio App. 3d 221 (1989); Beck v. Lone Star Broadcasting Co., 1998 Tex. App. Lexis 2059 (1998); Dodds v. American Broadcasting Company, Inc., 1998 U.S. App. Lexis 10459 (1998).

[128] See *e.g.*, Bressler v. Fortune Magazine, 971 F.2d. 1226 (1992); Woodcock v. Journal Publishing Company, Inc., 230 Conn. 525 (1994); Thomson Newspaper Publishing Inc., v. Coody, 320 Ark. 455 (1995).

[129] Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 263 (1996).

[130] *Id.* at 265.

[131] *Id.* at 267.

Conclusion

The examination of these cases shows that the First Amendment is thriving in the arena of libel litigation. The actual malice standard is a very high one, very difficult for public officials to prove against news organizations, as the Supreme Court intended. The courts are continuing to take an aggregate approach, in which no single circumstance or factor rises to the necessary level of proof, but one of those aspects is that the falsity or level of distortion itself must be severe.

The more intriguing finding involves courts considering what the Supreme Court said it did not intend. In *New York Times*, the Court carefully said that it was not including common law malice (ill will or evil intent) within its standard of actual malice. However, this analysis shows that the courts are unwilling to give up the link. If any one factor dominated the lengthy appellate reviews in which the actual malice finding was upheld, it was discussion of journalists' conduct, attitude or implied threats. Common law malice was an integral element in each of those decisions, as it was in the close-to-the-line case from New Jersey. As courts aggregated their factors on the way to an actual malice determination, common law malice often appeared to be the one that tipped the scales.

It would be fruitful to examine the much larger number of public figure libel plaintiffs to see if there are differences in how the courts are looking at actual malice between the two "public" categories. Another useful extension of this study would be to determine what happened to the "maybe" cases. So far, they have not come back through the judicial pipeline, so settlement is a likely outcome. Still, this research is a beginning. It shows that today's trial and appellate courts overwhelmingly are taking the U.S. Supreme Court's First Amendment directives very seriously, especially at the core of the constitutional protection, when politicians sue the news media.

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[132] *Id.* at 268.
[133] *Id.* at 267.

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Crumbling Barriers to Newsroom Searches: The Erosion of the Privacy Protection Act of 1980

by

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Abstract

Crumbling Barriers to Newsroom Searches: The Erosion of the Privacy Protection Act of 1980

The Privacy Protection Act of 1980 was enacted to create barriers to the issuance of warrants for newsroom searches in the aftermath of the U.S. Supreme Court's *Zurcher vs. Stanford Daily* decision. This study finds that although newsroom searches are not widespread, adverse court rulings, limited sanctions for violations, law enforcement -- and sometimes press -- ignorance of the law, and Congressional tampering have significantly weakened the intended protections of the Act.

> *RENO, Nev. (AP) -- Sheriff's deputies armed with search warrants raided Reno's three television stations and its newspaper on Wednesday for copies of an interview with a man accused of opening fire on Interstate 80.*
>
> *"I'm not declaring war on the media," said District Attorney Richard Gammick, who requested the warrants.*
>
> *"We know what the press privileges are and we're not trying to violate those at all. It's my belief that once a newsperson goes up and interviews a defendant in the jail about the crime, they become a witness."*
>
> **January 6, 1999 Associated Press Dispatch**

For most of the first two centuries of America's history, newsrooms enjoyed significant protection from search and seizure under a line of legal decisions recognizing the special status of private papers traceable to 18th Century Britain.[1] In the late 1960s, however, the U.S. Supreme Court began to repudiate these traditional protections. This reversal of approach culminated in the 1978 *Zurcher v. Stanford Daily*[2] decision in which the Court ruled that neither third parties, by virtue of not being suspects in a crime, nor newspapers, by virtue of the First Amendment, had any special protection from search and seizure if law enforcement agents had probable cause to believe that evidence relating to a crime existed on their premises.

Congress reacted to *Zurcher* by passing the Privacy Protection Act of 1980,[3] which became effective January 1, 1981. The Act severely restricted the grounds on which search warrants could be issued for newsrooms.

Although *Zurcher* and the passage of the Act generated some scholarly and legal attention in the early 1980s, there has been very little attention to this topic in the scholarly literature since the first half of the 1980s[4] and virtually no inquiry into whether the Act achieved its purpose.

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[1] Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va. L. Rev. 869,870 (1985).

[2] Zurcher v. Stanford Daily, 436 U.S. 547, *reh. denied*, 439 U.S. 885 (1978)

[3] The Privacy Protection Act of 1980, 42 U.S.C. §2000aa (1980)

The issue of newsroom searches is an important one for American journalists. The search process itself is extremely disruptive to the newsgathering and publishing functions. Additionally, many journalists fear that the threat of searches may intimidate confidential sources. Although law enforcement officials may arrive with a warrant related to one issue or set of materials, the process of fulfilling that warrant may allow them access to other, unrelated, confidential and sensitive material. There is also a concern that unrestrained searches could become an effective tool for government harassment of the media, allowing law enforcement or government officials to respond to media criticism by launching retaliatory searches, or create an environment in which newsroom employees engage in self-censorship.

The purpose of this paper is to determine whether the effort by the legislative and executive branches to prohibit police searches of newsrooms, except under unusual circumstances, has been effective. It will review the background and issues leading to passage of the Privacy Protection Act of 1980 and examine federal court decisions since its enactment to assess the level of protection it provides.

Background and Literature Review

Twentieth century protections against newsroom searches trace their roots to the early English case of *Entick v. Carrington.*[5] In *Entick*, the victim of a search filed trespass charges against the officers who seized his personal papers, and the British court struck down the use of broad warrants to search the homes of those suspected of seditious

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[4] For articles since the mid-1980s, see Silas J. Wasserstrom and Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 Geo. L. J. 19 (1988); Gregory L. Brown (*Steve Jackson Games, Inc. v. United States Secret Service*) *Seizure of Stored Electronic Mail Is Not an 'Interception' Under the Federal Wiretap Act*, 69 Tul. L. Rev. 1381 (1995); Paul Allee Curtis, *New Limits on Freedom of the Press: Newsperson's Qualified Privilege Fails to Protect Nonconfidential Videotape Outtakes (*State v. Salsbury) 34 Idaho L. Rev. 191 (1997).

[5] 19 Howell's State Trials 1029 (1765).

libel for books, papers, and other evidence. Reacting primarily to this British abuse of warrants, America's Founding Fathers created the Fourth Amendment[6] to prevent similar problems.[7]

In 1886, the U.S. Supreme Court was faced with a case involving a merchant suspected of import violations being ordered to produce relevant books and papers under penalty of federal law.[8] The Court ruled that a search for private papers was barred under both the Fourth Amendment ban on unreasonable search and seizure and the Fifth Amendment prohibition against self-incrimination,[9] establishing what became known as the "private papers doctrine."[10] Justices Brandeis and Frankfurter later praised *Boyd v. United States* as "a case that will be remembered as long as civil liberty lives in the United States."[11]

With *Boyd* as precedent, the Court expanded the private papers doctrine in *Gouled v. United States*[12] by distinguishing between "mere evidence" and "real evidence" of a crime. Mere evidence included materials and documents of only circumstantial value.

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[6] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[7] Dan Rosen, *Newsroom Searches: The Privacy Protection Act Takes Effect*, 9 Am. J. Crim. L. 196 (1981).

[8] Boyd v. United States, 116 U.S. 616 (1886).

[9] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[10] Rosen, *supra* note 7, at 196.

[11] Olmstead v. United States, 277 U.S. 438, 474 (1928).

[12] 255 U.S. 298 (1921).

Third party search and seizure of such materials was deemed "unreasonable." "Real evidence" was defined as "contraband and fruits of the malfeasance," which was subject to search and seizure anywhere.[13]

The combination of the private papers doctrine, the mere evidence rule, and the exclusionary rule -- which allowed courts to refuse admission of inappropriately gathered evidence -- dominated the law and prevented newsroom searches until the 1960s.[14] By the late 1960s, however, the balance of sentiment on the Court was beginning to shift from the protection of privacy to the effective prosecution of criminals.[15] In *Warden v. Hayden*[16] the Court ruled that purely evidentiary materials may be seized under the proper circumstances and reserved the question of whether there are some materials of evidentiary value whose nature precludes search and seizure,[17] thus weakening the mere evidence rule.[18]

Two 1976 cases involving searches of attorneys' offices fatally undercut the private papers doctrine.[19] In *Fisher v. United States*,[20] the Court ruled that the private papers doctrine, if it restricts law enforcement officials at all, limits only their ability to seize evidence directly from the accused. They described the private papers doctrine as

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[13] Rosen, *Supra* note 7, at 197.

[14] *Id.* 198.

[15] Schnapper, *Supra* note 1, at 871.

[16] 387 U.S. 294, 303 (1967).

[17] Schnapper, Supra note 1, at 871.

[18] Rosen, *Supra* note 7, at 198.

[19] *Id.* 201.

[20] 425 U.S. 391 (1976).

"a rule searching for a rationale."[21] In *Andresen v. Maryland,*[22] the Court ruled that a search for evidence in the offices of an attorney accused of fraud did not constitute self-incrimination under the Fifth Amendment since the search -- not the attorney's actions -- produced the evidence.[23] It described the previous broad rule against forced production of incriminating documents as being based on "discredited" precedents.[24]

Thus, by 1978, when it decided *Zurcher*, the Court's position on the seizure of papers had largely rejected traditional guidelines. Some legal scholars argue this reflects a basic ambivalence by the Court about the relationship between the Fourth Amendment prohibition of "unreasonable" searches and the guidelines for issuing search warrants.[25] They believe there are two distinct lines of U.S. Supreme Court cases regarding search and seizure. In the first, decisions treat the Fourth Amendment as allowing searches -- even without a warrant -- if the search itself is not "unreasonable." In such cases, the Court tends to view the existence of a properly issued warrant as strong evidence of the search's reasonableness.[26] Under this view, neither documents nor other objects enjoy any special protection from seizure.[27] The second line of cases, they assert, treat the warrant and search and seizure clauses as establishing distinct constitutional rights barring searches --even with warrants -- if the search is otherwise deemed "unreasonable."[28]

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[21] *Id.* at 409.

[22] 427 U.S. 463 (1976).

[23] Rosen, *supra* note 7, at 202.

[24] 427 U.S. at 472.

[25] Schnapper, *supra* note 1, at 871-872.

[26] *See* Robbins v. California, 453 U.S. 420, 423 (1981); Payton v. New York, 445 U.S. 573, 586 n.25 (1980); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); South Dakota v. Opperman, 428 U.S. 364, 372-73 (1976).

[27] Schnapper, *supra* note 1, at 872.

It was into an environment characterized by the ascendance of the former line in which traditional protections were being eroded that the *Zurcher* controversy was destined to arrive. On April 9, 1971, nine police officers were injured as they sought to remove demonstrators who had seized the administrative offices of the Stanford University Hospital. The officers were able to identify only two of their assailants but did report seeing someone taking pictures of the melee.[29]

On April 11, the *Stanford Daily*, a student newspaper, published a special edition with pictures of the attack on the officers. On April 12, the Santa Clara County District Attorney's Office secured a warrant from the municipal court to search the student paper offices "for negatives, film, and pictures showing the events and occurrences at the hospital on the evening of April 9."[30] There were no allegations that any member of the *Stanford Daily* staff was in any way suspected of involvement in the illegal events at the demonstration, simply a statement of probable and reasonable cause to believe the photographs were in the newspaper offices.

Four officers searched the *Stanford Daily* offices on the afternoon of April 11, in the presence of several staffers. Locked drawers and rooms were not searched although the officers apparently had an opportunity to read notes and correspondence during the search. No pictures in addition to those already published were found, and the officers left without removing anything.[31]

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[28] *See* Arkansas v. Sanders, 442 U.S. 753, 758 (1979); Dalia v. United States, 441 U.S. 238, 257 (1979); Osborn v. United States, 385 U.S. 323, 351 (1966); Carroll v. United States, 267 U.S. 132, 147 (1925).

[29] J. Kirk Boyd, *Legislative Response to Zurcher v. Stanford Daily*, 9 Pepp. L. Rev. 131, 136 (1981).

[30] *Id.* at 137.

A month later, the *Stanford Daily* and some staff members filed suit in U. S. District Court for the Northern District of California against the police officers who conducted the search, the chief of police, the district attorney, an assistant district attorney, and the judge who issued the warrant.[32] The suit sought declarative and injunctive relief and alleged the search had "deprived respondents under color of state law of rights secured to them by the First, Fourth, and Fourteenth Amendments."[33] The plaintiffs requested a permanent injunction barring the issuance of warrants for materials developed in the process of gathering news.

The district court denied the request for an injunction but granted a motion for summary judgment. The court ruled that the Fourth and Fourteenth Amendments prohibit search warrants for third parties not suspected of involvement in a crime unless there is probable cause to believe they will ignore a subpoena or destroy the documents. The court further found that when the search involves a newspaper, First Amendment considerations limit the circumstances in which a warrant is allowable to those in which there is a clear showing that important materials will be destroyed or removed, and that a restraining order would be ineffective.[34]

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[31] *Id.* at 136.

[32] Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd.*, 436 U.S. 547, *reh. denied.* The suit was filed under 42 U.S.C. 1983 (1970).

[33] 436 U.S. at 552.

[34] *Id.* at 553

The Ninth Circuit affirmed the district court findings,[35] and the defendants appealed to the U.S. Supreme Court. The case was heard in 1978. Justice White wrote the 5-3 majority opinion reversing the lower courts' rulings while Justices Stewart, Marshall, and Stevens delivered separate dissenting opinions. Justice Brennan did not participate.[36] After considering the reasoning underlying the lower court opinions, White and the majority determined:

- That the state interest in uncovering evidence related to a crime is the same whether the property to be searched belongs to a suspect or a non-suspect. Therefore, innocent third parties should have no greater protection from searches than should the guilty in matters involving recovery of evidence.[37]

- That the interests of law enforcement outweigh the individual's privacy interests in such matters.[38]

- That newspaper offices do not merit higher standards for issuance of search warrants. The majority found that sufficient media protections are created by requiring the courts to "apply the warrant requirements with particular exactitude" in First Amendment cases.[39]

- That searching a newspaper office for evidence such as news photographs taken in a public place does not constitute a realistic threat of prior restraint and that any such threat can be avoided by magistrates taking appropriate care in the issuance of warrants.[40]

- That "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure, but we decline to reinterpret the Amendment to impose a general constitutional barrier against warrants to

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[35] 550 F.2d 464 (9th Cir. 1977).

[36] 436 U.S. at 548.

[37] *Id.* at 555.

[38] *Id.* at 562-63.

[39] *Id.* at 565. The Court said, "[P]roperly administered, the preconditions for a warrant--probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness--should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.*

[40] *Id.* at 567.

> search newspaper premises, to require resort to subpoenas as a general rule, or to demand prior notice and hearing in connection with the issuance of search warrants."[41]

Justices Stewart and Marshall concurred that the Fourth Amendment did not bar searches of innocent third parties but dissented on the issue of newsroom searches. They argued that such searches were physically disruptive and created the possibility of compromising confidential sources. Justice Stevens dissented on both points.

The ruling drew prompt criticism from the media. It was described as "a first step toward a police state," a threat to the "privacy rights of the law-abiding," and a ruling that "stands on its head the history of both the First and the Fourth Amendments."[42]

The political establishment responded. Congress held hearings and 19 bills concerning newsroom searches were introduced in the ninety-fifth Congress. President Carter vowed to propose legislation "to correct the threat of encroachment on freedom of the press that was raised in the *Stanford Daily* case."[43]

Attorney General Griffin Bell appointed a committee, led by Assistant Attorney General Philip Heymann, to investigate the issue and draft legislation.[44] In a 1979 panel discussion, Heymann identified several factors that influenced his committee's final recommendations: [45]

- Newsroom searches were relatively recent and relatively rare. According to Heymann, "We saw that a search for mere evidence, like the photographs of the *Stanford Daily*, would not have been permissible at all before the late 1960s. So what we were talking about was obviously a type of search that the federal, state, and local governments had been able to do without during the first 170 years of the Bill of Rights." Heymann also said there had never been a press search by the federal government or by 47 of the states.

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[41] *Id.* at 571.

[42] S. Rep. No. 874, 96th Cong., 2d Sess. 5 (1980).

[43] Louis Fisher, *Congress' Role and Responsibility in the Federal Balance of Power: Congress and the Fourth Amendment*, 21 Ga. L. Rev. 107, 150. (1986)

[44] Rosen, *supra* note 7, at 212.

[45] *See* remarks of Philip B. Heymann, Assistant United States Attorney General, in *The Rights, Privileges,* and *Power of the Press*, 1 Com. & L. 1, 25-26 (1979) (panel discussion at the annual judicial conference of the second judicial circuit of the United States, May 26-28, 1979).

- Heymann's committee observed that searches were inherently more dangerous to the press than subpoenas because searches required the searchers to review unrelated materials and documents "which they have no business reading."
- The committee recognized the complexities and difficulties inherent in dealing with situations in which individuals are in danger or stolen government documents are involved.
- The committee also struggled with the problem of defining the press.

The committee finally drafted, and President Carter submitted to Congress in April 1979, a subpoena-first bill establishing curbs on the rights of federal, state, and local law enforcement officers to obtain search warrants for individuals involved in First Amendment activities.

In the Congress, there was a strong desire to reverse the effects of the Supreme Court ruling.[46] Robert Kastenmeier, a Wisconsin Democrat who managed the bill in the House, introduced it by saying:

> Mr. Speaker, sometimes a longstanding principle of constitutional jurisprudence is thrown into doubt by a decision of the Supreme Court which -- while it may answer a narrow question based on specific facts -- leaves Government officials and members of the public in doubt as to how to interpret the law. When this occurs it is often best for Congress to step in to fill the void, rather than to await the results of many years of potential litigation which will again redefine the principle. This is the case with respect to the matter before us today -- legislation to redefine a portion of the law of search and seizure in response to the Supreme Court's decision in Zurcher against *Stanford Daily* in 1978.[47]

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[46] Fisher, *supra* note 43, at 151.

[47] 126 Cong. Rec. 26,562 (1980).

During congressional hearings on the bill, virtually all those testifying in favor expressed the belief the bill's protections should be extended to all innocent third parties. The Justice Department, however, opposed this expansion, arguing it would damage law enforcement efforts. Ultimately, the Senate Judiciary Committee reported out a bill designed to protect materials "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."[48] The bill was approved by Congress on October 13, 1980, and signed by President Carter the following day.

The Privacy Protection Act of 1980 distinguishes between two types of materials -- "work products" and "other documents" -- and provides a different level of protection from search and seizure for each.[49] "Work products" include interviews, story drafts and internal memos developed for publication in newspapers or books, to be broadcast, or to be disseminated by other forms of public communication. Such materials may be seized with a warrant only if law enforcement officials have probable cause to believe the person holding the materials has committed a crime to which the materials relate, has possession of materials relating to "national defense, classified information, or restricted data," or if there is reason to believe seizure of the materials may prevent serious injury or death to a human being.

"Other documents" consist of written and printed items, photographs, film and video or audiotapes collected in the process of preparing work products. As with work products, search and seizure with a warrant is prohibited with limited exceptions. The same criminal activity, national defense, and danger to a human being exceptions that apply to work products apply to other documents. Additionally, however, exceptions are allowed for issuing warrants if:

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[48] 42 U.S.C. §2000aa.

[49] 42 U.S.C. §2000aa (a), (b).

(1) there is reason to believe the materials may be destroyed in response to a subpoena or (2) if the materials have not been produced in response to a subpoena, all appellate remedies have been exhausted and continued delay in obtaining the materials may "threaten the interests of justice." In these cases, however, the law requires that the person having the "other documents" be permitted an opportunity to challenge in court whether the materials should be subject to seizure.[50]

At the time of the Act's passage, some observers noted that the exceptions for searches for classified or national security information could have been used to justify a search of *The New York Times* to seize the Pentagon Papers while others argued that such authority already existed and The Privacy Protection Act merely preserved the status quo.[51] Some authors questioned whether congressional failure to define terms like "probable cause" and "when further delay would threaten the interests of justice" would leave too much to the discretion of magistrates and open the door to potential abuse of the exceptions permitted under the act.[52] There was also concern that the loss of the exclusionary rule would encourage newsroom raids.[53] Before the 1960s, evidence obtained in an illegal search was suppressed. However, Section 106(3) of the Privacy

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[50] 42 U.S.C. §2000aa (c).

[51] See, e.g., Rosen, *supra* note 7, at 224.

[52] See, e.g., Tony Atwater, *Newsroom Searches: Is "Probable Cause" Still in Effect Despite New Law?* 4 Journalism Q. 4,9 (1983).

[53] Rosen, *supra* note 7, at 229.

Protection Act expressly states that "evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act."

With *Zurcher* and the cases leading up to it, the Supreme Court rejected legal reasoning that had limited search and seizure of private papers for nearly 300 years. Congress, in response, passed the Privacy Protection Act of 1980 to restrict the use of search warrants in situations involving public communicators to very narrow circumstances and to encourage the use of subpoenas. In the early 1980s, some commentators expressed concern that some provisions in the law provided opportunities to circumvent Congress' apparent intent but recognized that only the passage of time would show whether such concerns were realistic.

Research Questions, Method and Limitations:

After almost two decades of experience with the Privacy Protection Act of 1980, it is now possible to draw some conclusions about its effectiveness. The following research questions will be addressed:

- Do newsroom searches appear to be a significant problem for journalists?
- Does federal case law developed under the Act support the early concerns about vagueness?
- Have federal court decisions tended to strengthen or weaken the law as a barrier to newsroom searches?
- Does the act, as interpreted in case law, provide penalties and remedies sufficient to discourage newsroom searches by law enforcement officials in violation of the Act?

The analysis will involve reviewing federal court cases involving newsroom searches since 1980. Although state statutes exist in this area, the Privacy Protection Act of 1980 specifically preempts any statutes providing lesser levels of protection,[54] so a focus on federal decisions is most appropriate. Additionally, section 106(a)(1) of the bill specifically requires that any suits arising out of the Privacy Protection Act be heard first in a United States district court -- even if state or local government is the defendant.

Lexis searches keyed to "The Privacy Protection Act of 1980" and to "search warrants and newsroom" were used to identify relevant cases. Lexis-Nexis searches of wire service stories, major newspapers, trade journals, and magazines were also used to identify newsroom searches that had either been unreported in case reporters or did not result in litigation.

Limitations of the study include the difficulties of obtaining information about requests for search warrants that may have been denied because of the Act and cases which did not result in litigation.

Magnitude of the Search Issue

Newsroom searches do not appear to be a frequent occurrence. Lexus-Nexis searches for wire service, magazine and newspaper stories dealing with newsroom search warrants and a search of the Reporters Committee For Freedom of the Press web site of *News Media Update* reports for the periods 9/14/93 through 5/4/98 -- the period covered by their online database -- revealed fewer than a half-dozen cases.[55] Typically, these cases appear to be settled without litigation.

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[54] 42 U.S.C. §2000 Subsection 108.

[55] Reporters Committee for Freedom of the Press (visited August 1, 1998)
<http://www.rcfp.org/NMU/index.cgi>

A representative example was the October 1990 search of the *Macomb* (Mich.) *Daily* newsroom for a reporter's interview notes with a witness to a shooting.[56] After one judge declined to issue a warrant, a second judge granted the police request after being told that the newspaper "wanted a warrant so it could cooperate." The county prosecutor, when notified, intervened and ordered the return of the uncopied notes.

In a similar case involving KOMU-TV in Columbia, Mo.,[57] police obtained a search warrant for tapes of a telephone interview with a confessed murderer in February 1994. They then returned with a second warrant in search of videotapes of the defendant's arraignment. The district attorney, who said he was unaware of the Privacy Protection Act of 1980, quashed the searches after being informed of their illegality. The TV station, which is affiliated with the University of Missouri, declined to pursue legal action.

In an August 1994 search of the hotel room of a CBS producer, Spokane, Wash., police sought film of violence involving a gypsy family. After talking with CBS attorneys, the police agreed to copy the film and return the original film to the crew. The mayor, city manager, and Spokane City Council subsequently apologized to CBS for the search. No legal action resulted.[58]

One key problem reflected in many of these searches, according to Sandra Davidson Scott, who teaches communication law at the University of Missouri School of Journalism, is that prosecutors and law enforcement officials -- and even journalists and media lawyers -- are often unaware of the provisions of the Privacy Protection Act.[59] Indeed, in the case resulting in the largest damages award since enactment of the Act, *Steve Jackson Games v. U.S. Secret Service*,[60] the trial judge specifically observed that the agent responsible for the search appeared unaware of the existence of The Privacy Protection Act and its application to enterprises engaged in publishing information to the public.[61] Ignorance of the law appears to have been a factor also in the Reno incident involving three television stations and a newspaper cited at the beginning of this paper. In the words of KOLO-TV News Director Ed Pearce: "We've since had a y'all come meeting with the DA and he considers the matter closed. He admits he was unaware of some of the provisions of the law and says he never intends to do it [seek newsroom search warrants] again."

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[56] Reported September 30, 1990, UPI, BC cycle, Regional News, "Paper Protests Seizure of Reporter's Notes." Also reported October 2, 1990, The Associated Press, Tuesday, PM cycle, Domestic News, "Reporter's Notebook Seized by Police, Newspaper Threatens to Sue."

[57] Sandra Davidson Scott, *When Police Storm the Newsroom--With A Search Warrant*, 127 Editor & Publisher 48 (March 26, 1994).

[58] News Media Update for 8/9/94 at<http://www.rcfp.org/NMU/index.cgi>

The Development of Federal Case Law

A Lexis search of federal cases resulted in the identification of several hundred cases involving the Privacy Protection Act of 1980. Closer scrutiny, however, reveals that the vast majority of cases were inappropriate for this analysis. They range from non-media cases involving requests for attorneys' fees to a case involving a 72-year old child pornographer who alleged the seizure of photographs of unclad children was illegal because the material was intended for publication.[62] The vast majority of the cases involve allocation of attorneys' fees issues. There are no Supreme Court cases involving the Act, but there are three cases, two at the U.S. District Court level and one at the U.S. Court of Appeals level, that are significant. These will be further examined below.

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[59] Scott, *supra* note 57 at 48.

[60] 816 F. Supp. 432; 1993 U.S. Dist. LEXIS 3378

[61] 816 F. Supp. at 436.

[62] DePugh v. Sutton, 917 F. Supp. 690; 1996 U.S. Dist. LEXIS 2334

In considering whether federal case law is effective in discouraging newsroom searches, two factors are important to consider -- the ease with which law enforcement officials can obtain search warrants and the effectiveness of the courts in providing remedies for violations of the Act.

Requirements for Obtaining Warrants

Writing shortly after adoption of the Act, several authors[63] questioned whether Congress' use of vague language in describing exceptions to the Act and a lack of definition for "probable cause" would tend to undermine the effectiveness of the Act. The probable cause issue does not appear to have figured prominently in the major Privacy Protection Act cases. In the *Minneapolis Star* case, the search and seizure was conducted without a warrant. In *Steve Jackson Games*, the court specifically found that the grounds for the warrant were sufficient:

> Foley's [a federal agent] affidavit, executed on February 28, 1990, was sufficient under the law for the issuance of a search warrant by the United States Magistrate Judge. The Court does not find from a preponderance of the evidence that the admitted errors in Foley's affidavit were intentional and so material to make the affidavit and issuance of the warrant legally improper. . . . The affidavit and warrant preparation was simply sloppy and not carefully done.

In this case, Steve Jackson Games, the publisher of books, magazines and role-playing games, offered e-mail services to users of its electronic bulletin board. When the U.S. Secret Service discovered that proprietary information regarding the workings of a major telephone company's system was posted on the bulletin board, they obtained a warrant and seized the computer operating the bulletin board under statutes related to illegal computer access and interstate transportation of stolen property.

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[63] *See* Atwater, *supra* note 52, at 4; and Susan K. Erburu, (Zurcher v. Stanford Daily) *The Legislative Debate*, 17 Harv. J. on Legis. 154 (1980).

The seized computer, however, contained magazine articles and the draft of a book which were scheduled for publication. Although the warrant was found legal, the seizure of the book and articles was found to be illegal under the Privacy Protection Act and the government was ordered to pay damages related to lost revenues arising from delayed publication of the materials.

In *Citicasters v. McCaskill*, the validity of the warrant was a central issue. The question, however, was not one of probable cause but rather whether law enforcement agents are required to state the grounds that they believe justify a warrant as an exception to the Act before a proper warrant can be granted.

On August 5, 1994, a tourist visiting Kansas City, Mo., videotaped the abduction of a woman from a downtown street. The victim was dragged into a nearby building and murdered before police officers arrived at the scene. The tourist also videotaped the arrival of law enforcement officers and a subsequent exchange of shots between the assailant and police. Although the assailant briefly eluded police, he was captured about 20 minutes later. The tourist offered his videotape to WDAF-TV, which copied the video, returned the original to the owner and broadcast about 15 seconds of the 14 minute tape on its evening news program. Shortly after the broadcast, police representatives contacted the television station and expressed interest in the video. Station management told the police that the tourist had left town with the original tape and that police officials could review the station's copy but would have to have a subpoena to obtain a copy. Acting on the belief that the tape was important to securing an indictment against the assailant and concerned that Missouri's speedy trial laws would force them to release the suspect, law enforcement officers obtained a search warrant. The station relinquished the tape and, days later, filed suit in U.S. District Court, alleging violations of the Privacy Protection Act of 1980.[64]

The district court ruled that the tapes constituted documentary materials under the Act and were "possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication," establishing applicability of the Act.[65] The defendants argued that a search warrant was appropriate because under state law, subpoenas could only be obtained after charges had been filed against the suspect. The court rejected that argument, noting that the Act specifically gave states one year to bring state law in compliance with the Act and that Missouri's failure to do so could not be used as a basis to "circumvent the Act."[66] Finally, the defendants argued that the warrant was justified under two exceptions to the Act: when there is reason to believe it is "necessary to prevent the death of, or serious bodily injury to, a human being,"[67] and when "there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials."[68] The defendants argued that the potential release of the suspect would result in danger to witnesses or the public at large. They also said it was reasonable to believe that because of the nature of the plaintiff's business, unused portions of the tape might be edited or discarded during the time it would take to obtain a subpoena from the grand jury. The court, noting that no questions regarding public safety or the preservation of the tape were made in the application for the search warrant observed:

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[64] Michael Sherer, *KC Cops Make Newsroom Search*, 49 News Photographer 17-18 (Dec. 1994).

[65] 883 F. Supp. at 1286.

[66] *Id.* at 1288.

[67] 42 U.S.C. 200aa(3).

[68] 42 U.S.C. 2000aa(b)(3).

> Thus, the question for the court is to consider whether the defendant may claim an exception to the Act when the application for the search warrant is devoid of reasons supporting the exception. The court finds that to allow a defendant to claim an exception, after a search and seizure has occurred, allows a defendant to justify its conduct in hindsight. The legislative history of the Act envisioned that a defendant would state the basis for exceptions when applying for the warrant. Moreover, if circumstances exist which constitute an exception, the defendant should state these reasons in an affidavit for a warrant. Thus, because the affidavit in support of the search warrant did not set forth reasons which fall under an exception to the Act, the court will not allow defendants to invoke those exceptions.[69]

After finding that members of the Board of Police Commissioners were state officials thus protected as a whole by sovereign immunity and that Jackson County Prosecutor McCaskill was not, the court awarded the plaintiffs $1,000 in liquidated damages for McCaskill's violation of the Privacy Protection Act and ordered the return of the original videotape.[70]

The defendants appealed to the Eighth Circuit Court of Appeals. The appeals court noted that the Act does not specifically provide a requirement that search warrant requests must describe the exception being used and questioned whether the legislative history provided a basis for the lower court decision.[71] It further observed that it is the duty of the courts to rely on the unambiguous, plain language of Congress, not to engage in unnecessary interpretation. With those guidelines, the court ruled:

> We find no ambiguity in the Privacy Protection Act. . . .The Act presents a straightforward statutory scheme for protecting those engaged in information dissemination from government intrusion by prohibiting searches and seizures of

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[69] 883 F. Supp. 1288.

[70] Id. at 1293.

[71] 24 Med. L. Rep. (BNA) at 1354.

> documentary materials except where government officials have a reasonable belief that a statutory exception applies. Although Congress could have chosen to include elaborate procedural requirements in the Act, it instead created a private cause of action as the exclusive remedy to ensure that the protections of the Act would be effective, and allowed recovery of damages against those found liable for violations of the Act. . . . Where Congress has provided a specific means for achieving its purpose, we must honor its decision, and not embellish its legislative scheme with additional procedural innovations. . . . The district court's expansive interpretation of the Act simply disregards the balance struck by Congress between preserving the ability of government officials to prosecute crime and protecting those engaged in the dissemination of information from government intrusion.[72]

The appeals court then ruled that the Privacy Protection Act does not require a search warrant application to describe the exceptions to the Act under which the request is being made and said the lower court erred in failing to allow the defendants an opportunity to prove the exception existed after the fact. The lower court ruling was reversed, and the case was remanded for a factual determination of whether McCaskill actually participated in the search and seizure and whether, if she did, she "possessed a reasonable belief that an exception to the Privacy Protection Act existed."[73]

Judge Bright, concurring in part and dissenting in part, noted:

> By construing the Act so as not to require a prior judicial determination, the majority pulls the teeth out of the statute. The purpose of the Privacy Protection Act is to prevent the search and seizure of documentary materials from persons disseminating information. After-the-fact review can only punish violation, not prevent it. Furthermore, permitting an after-the-fact showing of what was "known" to the affiant but not communicated to the magistrate judge contains too great a potential for abuse; there could often be no assurance that the critical facts and details were in fact known prior to the issuance of the warrant.[74]

In August 1996, the Eighth Circuit denied a Petition for Rehearing.

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[72] *Id.* at 1355.

[73] *Id.* at 1357.

Remedies for Violations

The Act provides remedies for violations through civil actions.[75] It specifically grants jurisdiction to federal district courts without the usual $10,000 requirement and allows liquidated damages of not less than $1,000.[76] Shortly after the Act's passage, one author observed that the difficulty of establishing significant actual damages and the cost of litigation would discourage plaintiffs from suing.[77] This concern appears to have some merit. As noted above, most of the reported cases of newsroom searches appear to end without the filing of civil litigation.

Even when civil suits result, damages have been minimal. In *Minneapolis Star and Tribune Co. v. United States*,[78] staffers for *The Minneapolis Star and Tribune* and WCCO were photographing a narcotics arrest when a special agent of the FBI demanded their film and videotape on the grounds that undercover agents were present at the scene. Despite the photographers' offer to edit the film, the agent confiscated the materials. Several hours later, when the U. S. Attorney's office became aware of the confiscation, the film and videotapes were returned to the plaintiffs. WCCO broadcast its videotape that night, and *The Star and Tribune* decided not to publish its photographs. Both sued and the court ruled damages were de minimis, awarding each plaintiff $750.

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[74] Id. at 1360.
[75] 42 U.S.C. 2000aa.

[76] 42 U.S.C. 2000aa-106(f).

[77] Jose M. Sariego, *The Privacy Protection Act of 1980: Curbing Unrestricted Third-Party Searches in the Wake of Zurcher v. Stanford Daily*, 14 U. Mich. J.L. 525, 551 (. 1981)

[78] 713 F. Supp. 1308; 1989 U.S. Dist. LEXIS 5975; 16 Media L. Rep. BNA 1834.

In *Citicasters v. McCaskill*,[79] which was subsequently overturned on appeal, the U.S. District Court awarded the station $1,000 for a search involving seizure of a videotape of a murder victim being abducted from a public street by her assailant. In *Steve Jackson Games v. U.S. Secret Service*,[80] the U.S. District Court found that the Secret Service violated the Privacy Protection Act and awarded actual damages of $51,040. In that case, seizure of computer equipment containing manuscripts intended for publication resulted in expenses of nearly $9,000 for rental of replacement equipment and reconstruction of manuscripts and lost profits of approximately $42,000.

Fixing liability also presents difficulties. Although the Act provides that a plaintiff may directly sue the individual non-federal officer(s) involved in an illegal search,[81] it also provides that "it shall be a complete defense … that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct."[82] In *Citicasters*, the U.S. Court of Appeals for the 8th Circuit remanded the issue of McCaskill's participation in the search and seizure for retrial and instructed the lower court to determine whether she "possessed a reasonable belief that an exception to the Privacy Protection Act existed" at the time of the search.[83] The Act bars independent personal claims against federal officials,[84] instructing the Attorney General to settle claims brought against the federal government under the Act and to create administrative procedures for disciplining offending officers. Although the Act also permits suit against the United States government or state and local governmental units responsible for the actions of law enforcement officers,[85] action against state or local government is severely limited by the requirement that the state must have waived its Eleventh Amendment rights of sovereign immunity. In *Barnes v. Missouri*,[86] the Eighth Circuit held:

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[79] 89 F.3d 1350, 1996 U.S. App. LEXIS 17823 (8th Cir.)

[80] 36 F.3d 457; 1994 U.S. App. LEXIS 30323 (8th Cir.)

[81] 42 U.S.C. 2000aa-106 (a)(2).

[82] 42 U.S.C. 2000aa-106(b).

[83] 24 Media L. Rep BNA at 1357.

[84] 42 U.S.C. 2000aa-6(d).

> The Privacy Protection Act, which Barnes alleges has been violated, provides a cause of action against a state only if the state "has waived its sovereign immunity under the Constitution to a claim of damages resulting from a violation of this chapter." The language of this provision makes plain that Congress chose not to abrogate Eleventh Amendment immunity for causes of action under this statute.[87]

Few states have waived official liability in other contexts and are unlikely to do so for purposes of this Act.[88] Claims against officers of local governmental units, however, may not be barred by the rules of sovereign immunity.[89]

Given the difficulties of proving actual damages, the attorneys' fees awards have provided the more substantial penalties for government agents found in violation of the Act. The Act provides for attorney's fees and litigation costs as follows:

> A person having a cause of action under this section shall be entitled to recover … such reasonable attorney's fees and other litigation costs reasonably incurred as the court, in its discretion, may award.[90]

In *Steve Jackson Games*, the appeals court noted the district court award to the plaintiff of $195,9000 in attorneys' fees and $57,000 in costs without further comment.[91] Since the appeal involved the question of whether seizure of the computer equipment with unread e-mail messages on the hard drive constituted "interception" under the Federal Wiretap Act, the district court's findings on issues related to the Privacy Protection Act violations were unquestioned. In *Minneapolis Star & Tribune v. United States*,[92] however, the plaintiffs (who had been awarded $3,000 in damages, collectively) requested $208,733 in attorney's fees and litigation costs. The U.S. District Court concluded that a portion of the expenses requested related to initial claims that were subsequently disallowed. Following the Supreme Court ruling in *Hensley v. Eckerhart*,[93] which cautioned that "the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary," the district court ruled that the amount claimed was excessive and granted $80,200 in fees.[94] The court concluded the ruling with an admonition to the plaintiffs regarding excessive legal expense:

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[85] 42 U.S.C. 2000aa-106(a)(1).

[86] 960 F.2d 63; 1992 U.S. App. LEXIS 5193 (8th Cir. 1992).

[87] 42 U.S.C. §2000aa 6(a).

[88] Sariego, *supra* note 65, at 553.

[89] 883 F. Supp. 1282, 1995 U.S. Dist. LEXIS 9926 at 1291.

[90] 42 U.S.C. 2000aa-6(f)

[91] 36 F.3d. at 459.

> The court is not unmindful of the fact that two of the plaintiffs are in the business of gathering and disseminating news and are publishers whose conduct is entitled to First Amendment protection. But the action was pursued not on the basis of the First Amendment but of the Privacy Protection Act and even on the narrowest of issues of that statutory scheme. It appears to the court that these plaintiffs, in presenting the application in the form here as presented, have failed to recognize the interests of society in general in the cost of litigation and the hazard of overzealously asserting claims that do not warrant such intensive effort. In private litigation, both counsel and client must equate the reasonableness of the endeavor both to the client and to the law firm in terms of principle but also in terms of the economics of litigation. No less, indeed a greater, standard of economic rationality must apply in those cases in which claimants will seek ultimate recovery for fees and disbursements from the public treasury.

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[92] 713 F. Supp. at 1315.

[93] 461 U.S. 424, 434, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983).

[94] 713 F. Supp. at 1314.

Discussion and Conclusions:

Although newsroom searches appear to be relatively infrequent and, more often than not, the result of ignorance of the law, the Privacy Protection Act of 1980 does not appear to be as high a hurdle to law enforcement intrusion as was perhaps originally expected. Anecdotal evidence appears to support the notion that understanding of the Act by law enforcement and by media may be relatively low, suggesting that factors other than the Act may be responsible for the relative scarcity of searches.

Absent hard-to-prove actual damages, liquidated damage awards are low and the courts, in at least some jurisdictions, are inclined to take a restrictive view of what fees are appropriate for recompense under the Act. State laws regarding sovereign immunity further complicate the issue of identifying a vulnerable defendant in many cases. The result is that a news organization can prevail but still face large out-of-pocket expenses. This is hardly an encouragement to pursue litigation except in cases like *Steve Jackson Games* where provable losses are substantial.

Of more concern is the Eighth Circuit Court of Appeals ruling in *Citicasters*. Allowing law enforcement representatives to obtain search warrants based on a "reasonable belief" that an exception to the Act exists without requiring specification of that exception until after the search is completed appears to open a wide arena for potential abuse. Traditionally, it is assumed that the impartial scrutiny of the magistrate provides a check on potential Fourth Amendment abuses by law enforcement. It is hard to imagine how this can work effectively under the Eighth Circuit ruling.

These trends -- limited liability and damages and judicial support for a broad interpretation of the circumstances under which a warrant is considered appropriate --

clearly lower the bar and the stakes for law enforcement agents intent on prosecuting a newsroom search.

Further potential for erosion of newsroom protections is found in The Congress. In September 1996, amendments to the Privacy Protection Act were signed into law. The amendments, initially proposed by Senator Orrin Hatch, broaden the exceptions under which warrants may be issued to include "offense[s] involving the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, the sexual exploitation of children, or the sale or purchase of children. . ." Although one can hardly quarrel with the government's zeal to prosecute child pornographers, the amendment demonstrates the susceptibility of the Act to the Congressional passion of the moment. If child pornography merits an exception, why not information about drug trafficking or the operation of political or religious cults?

Recommendations

Several steps can be taken within the framework of existing law to strengthen the barriers to newsroom searches. The Privacy Protection Act of 1980 should be amended to require that law enforcement agents seeking warrants under existing exceptions to the act be required to identify and justify the exception being cited before the warrant is issued. This step would clearly establish legislative intent and render the Eighth Circuit findings in *Citicasters* moot.

Penalties and liability for violations of the act should be raised to a level that truly represents a deterrent. The ban on personal claims against federal agents should be eliminated to encourage individual responsibility. The minimum award of $1,000 should be increased to $10,000.

Finally, the media, acting through groups like NAA and state press associations, should take an active interest in strengthening the Act by discouraging the expansion of exceptions at the national level and by lobbying for the elimination of sovereign immunity protection for state officials at the local level.

Ban Spam? : Exploring the Legal Issues and Constitutionality of Federal and State Statutes and Bills Regulating Junk Email

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Submitted to the Law Division
Association for Education in Journalism and Mass Communications
in New Orleans, LA : August 4-7, 1999

Ban Spam? : Exploring the Legal Issues and Constitutionality of Federal and State Statutes and Bills Regulating Junk Email

Abstract

The purpose of this study is to examine legal issues and the constitutionality of both federal and state bills and statutes regulating unsolicited commercial electronic mail via the Internet. This paper suggests that in general federal and state bills and statutes can pass the *Central Hudson* test if they aim to prevent the 'cost-shifting' from advertisers to consumers, and this paper shows that *Destination Venture* case can be a strong precedent for the constitutionality of those bills and statutes. However, this paper also suggests that the privacy protection will not pass the *Central Hudson* test because the Supreme Court had different rulings about privacy protection. Furthermore, this paper also suggests that the Supreme Court's approach to the new medium - Internet - should be considered to assess the constitutionality of regulations of unsolicited commercial email because the Supreme Court has said that the Internet has highest protection from government regulation. So, this paper also showed that the blanket ban over unsolicited commercial email via the Internet might be unconstitutional if the Supreme Court uses the same approach to commercial speech in the Internet.

Introduction

Since its inception, the Internet has undergone tremendous changes. The Internet has become a viable means of communication for people all over the world. Because the Internet is a quick and efficient tool to reach millions of people at the same time, marketers and advertisers try to use the Internet as an efficient tool for advertising and marketing. According to NUA, one of Europe's leading online consultants and developers, the number of Internet users worldwide is estimated to be 100.5 million and by the end of the year 2000, the number will jump to 200 million.[1] Business Week's 1997 survey shows that current U.S. Internet users are 40 million.[2] And it will be expected to be 75 million by the end of year 1998.[3]

One of the forms of advertising which advertisers use through the Internet is "e-mail advertising". Currently anyone with an Internet e-mail account is familiar with this type of advertising, but there is still fierce on-line debate over e-mail advertising, especially about unsolicited e-mail advertising, because it often is not wanted by Internet users and it usually is posted to multiple news groups or mailing lists. It is called 'spam'.[4] Typically, the term "spam" is used to denote bulk e-mail advertisements.

Spam opponents complain junk messages have overwhelmed many Usenet newsgroups despite the cancelbot[5] software and human despammers. Spammers defend the free market system, saying that commercial speech is protected by the First Amendment. They argue that their messages are wanted by many persons and that they are entitled to disseminate advertising messages by the cheapest means.[6]

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[1] *See* deatils at "http://www.nua.ie/surveys/how_many_online/index.html".

[2] *See* details at "http://www.businessweek.com". The number of the Internet users in U.S. is different from each survey, but it usually is estimated to be from 40 million to 47 million.

[3] *See* details at "http://www.findsvp.com/timeline/trends.html".

[4] In Internet parlance, "spam" refers to send unsolicited commercial email to large groups of people, or post messages on large number of newsgroups or discussion lists. *See* Jill H. Ellsworth & Matthew V. Ellsworth, *Marketing On the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997 ; A word "Spam" was finally defined by New Oxford Dictionary of English as "irrelevant Internet messages sent to a large number of people", *see* New York Times, Aug. 20, 1998 at 3.

A recent survey undertaken by Equifax and Harris Associates, however, showed that over two-thirds of Internet consumers considered the spam problem as one of the most important problems to be solved in cyberspace and that they also thought junk emails should be regulated in certain way.[7]

On May 12, 1998, a bill known as the Murkowski Amendment[8] was unanimously passed by the U.S. Senate. It was first federal regulation of junk email passed in the Senate. Its main purpose is to prevent slamming[9] – the practice in which telephone companies switch users to their long-distance service without the users' authorization. This bill, however, includes the regulations of unsolicited electronic mail.[10] A slightly different version of the anti-slamming bill[11] has been introduced in the House, and it is expected to be passed the House by the end of this year. Also, there are several other bills in the Senate and House that aim to regulate electronic commercial advertising.[12] Many states also are trying to regulate unsolicited electronic commercial

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[5] A cancel-bot is a program that sends out cancel messages, *see* details at "http://www.cybernothing.org/faqs/net-abuse-faqs.html#2.1".

[6] Ed Foster, *The Gripe Line*, Infoworld, June 22, 1998, vol. 20, n25, p72.

[7] J.S. Kakalik & M.A. Wright, *Responding to Privacy : Concerns of Consumers*, Review of Business, Fall 1996, 15-18.

[8] 1998, S. 1618 ; 105 S. 1618.

[9] A word "slamming" means that the telephone company switch the users to their long distance service without users' permission or authorization.

[10] 1998, S. 1618 ; 105 S. 1618, Sections 301 and 302.

[11] HR 3888 ; 105th Congress.

[12] For example, "Netizens Protection Act", H.R. 1748 ; "Data Privacy Act", H.R. 2368 ; "Email User Protection Act", H.R. 4124 ; "Unsolicited Commercial Mail Choice Act", S. 771 ; "Electronic Mailbox Protection Act", S. 875 etc. *See* details at "http://www.jmls.edu/cyber/statutes/email/federal.html".

advertising through the Internet with state statutes.[13] These statutes and proposed statutes have something in common. First, they set requirements commercial emailers have to follow. Second, their requirements are basically same – a requirement of identification, a requirement for an opt-out service, and fines for electronic commercial advertisers who do not follow these requirements.

There are two different opinions about the statutes regulating unsolicited electronic mail. One is the opinion from the proponents of spam, and another is from spam opponents.[14] Spam opponents argue that almost all proposed federal regulations give unsolicited commercial email legal authorization and thereby make the junk email problem worse. If the spammers meet the requirements of the bills -- authentic contact information, physical address, email address, telephone number, and opt-out instructions -- the spammers can send junk email without any restrictions.

Spam proponents argue that these bills restrict the free market system and are contrary to the Supreme Court's view of free expression rights in the Internet as a medium.[15]

The U.S. Supreme Court has established different rules for print,[16] broadcast radio and television,[17] and cable television.[18] In its decision about Internet issues, the Supreme Court gave more protection for speech on the Internet than on the broadcast media.[19] The Supreme Court, however, has not focused on commercial speech on the Internet.

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[13] *See* 'http://www.jmls.edu/cyber/statutes/email/state.html'.
[14] Ed Foster, *The Gripe Line*, Infoworld, June 22, 1998, V. 20, n25, p72.
[15] *See* Reno v. ACLU, 117. S. Ct. 2329 (1997) ; *see* also 929 F. Supp. 824 (E.D. Pa. 1996). In this case, the Supreme Court said that the Internet as a new medium has highest protection from government regulation under the First Amendment.
[16] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[17] Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).
[18] Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).

The purpose of this study is to examine the constitutionality of federal and state bills and statutes that regulate sending unsolicited electronic commercial mail through the Internet.

Background

Because this paper seeks to assess the constitutionality of federal and state statutes regulating unsolicited commercial electronic mail through the Internet, a brief discussion of the Internet advertising will provide the background necessary for analysis.

Types of Internet Advertising

The history of online advertising spans a very short period of time that began with the commercial online service 'Prodigy'. 'Prodigy' first tested online advertising in 1990.[20] As Prodigy was testing advertising within its subscribe-only environment, others were exploring the commercial implications of Internet applications. One of them was the law firm of Canter and Siegel. In 1994, Canter and Siegel discovered the silver bullet for tapping the Internet as a cheap marketing medium and posted an advertisement for green card assistance to over 7000 newsgroups. Although Canter and Siegel received requests for green card assistance as a result of its ad, their ads prompted a host of imitators and led to an outraged discussion of junk email, named 'spam',[21] in the online community.[22] Internet etiquette, known as netiquette,[23] dictates that discussion forums not be used to post commercial materials that have nothing to do wth the subject of the discussion group. Just before spam wars occurred by Canter and Siegel, 'Wired' magazine launched 'Hotwired' Internet site with an advertising business model.[24] 'Hotwired' signed its first ad contact with AT&T on April 15, 1994, and this site launched on October 27, 1994. These were the first commercial banner ads in the Internet. And Canter and Siegel's spam was the first commercial electronic mail in the Internet.

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[19] Reno v. ACLU, 117 S. Ct. 2329 (1997).

[20] Robin Zeff & Brad Aronson, *Advertising on the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997.

There are many different types of Internet advertising according to external types of ads. It can be a 'web site'[25] in the 'world wide web',[26] an e-mail via the Internet, or a message posted on a Usenet-news group site.[27] However, there are only two distinguishable types of Internet advertisements according to the way of access. One is passive advertising, another one is intrusive advertising. The common form of Internet advertising is passive advertising, which the user voluntarily accesses to the advertising, for example web site. Usually the intrusive Internet advertising is unsolicited commercial e-mail which the user receives from sender.[28]

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[21] In Internet parlance, "spam" refers to send unsolicited commercial email to large groups of people, or post messages on large number of newsgroups or discussion lists. *See* Robin Zeff & Brad Aronson, *Advertising on the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997.

[22] *Id.* at 16-21.

[23] *Id.*

[24] *Id.*

[25] "Web site" is an Internet address that permits users to exchange information with a particular host. In Internet parlance, the "Host" is referred to the Internet access provider's computer. *See* Robin Zeff & Brad Aronson, *Advertising on the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997.

[26] "World Wide Web" is a client/server system designed to use hypertext and hypermedia documents via Internet. *See* Robin Zeff & Brad Aronson, *Advertising on the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997.

[27] "Usenet" groups refers to thousands of discussion groups based on public postings of message. Newsreader software interacts with Usenet servers and allows messages to be read by topic and discussion thread, and provides provisions for responding to particular messages. *See* Robin Zeff & Brad Aronson, *Advertising on the Internet*, Wiley Computer Publishing, John Wiley & Sons, Inc., 1997.

Literature Review

Legal scholars started exploring spam as a legal issue after the *Cyber Promotion v. AOL* case.[29] Several articles explore the legal issues surrounding Internet and spam.[30] These articles are focused on the Supreme Courts' approach to the Internet,[31] the inefficacy of existing law to regulate spam,[32] and new legal approaches to regulating spam.[33]

Most of the articles reviewed the issue of First Amendment protection for commercial speech and suggested a rationale for regulating unsolicited commercial electronic mail. For example, Anne W. Branscomb argued in the *Yale Law Journal* that junk email unlike junk mail requires the recipient to download the message. She explained that cost-shifting happens when a message is downloaded because it takes time to download the messages from the email depostory.[34] Branscomb argued that "prohibiting sending email advertisements into newsgroups was reasonable, because such inundation is disruptive, intrusive, and surely an invasion of the sanctity that the Supreme Court purportedly protected in *Rowan v. U.S. Post Office*".[35] *Rowan* was a challenge to a federal statute that prohibits vendors from mailing erotically arousing or sexually provocative materials to addressees who have asked not to be sent such materials.[36] In *Rowan v. U.S. Post Office Department*, the Supreme Court ruled that a mailer's right to communicate stopped at the mailbox of an addressee, and every person has autonomy to permit and to exercise control over unwanted mail.[37] Branscomb concluded that prohibiting the delivery of commercial messages to email destinations would be consistent with the First Amendment's goal of encouraging a diversity of information sources without intruding upon the sanctity of personal email.[38] She also argued that the Telephone Consumer Protection Act of 1991[39] could be a legal frame work for regulating junk email.

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[28] *See* Joshua A. Marcus, *Commercial Speech On The Internet : Spam and the First Amendment*, 16 Cardozo Arts & Entertainment 245 (1998).

[29] 948 F.Supp. 456 (E.D.Pa. 1996).

[30] Joshua A. Marcus, *Commercial Speech On The Internet : Spam and the First Amendment*, 16 Cardozo Arts & Entertainment 245 (1998) ; Jonathan Byrne, *Squeezing Spam Off the Net : Federal Regulation of Unsolicited Commercial E-mail*, 2W. Va. J. L. & Tech. 4 (1998) ; David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L. Rev. 1001 (1997) ; Anne Wells Branscomb, *Anonymity, autonomy, and accountability : challenges to the First Amendment in cyberspace*, 104 Yale L. J. 1639 (1995) ; Mark S. Kende, *The Supreme Court's approach to the First Amendment in cyberspace : free speech as technology's hand-maiden*, 14 Constitutional Commentary 465 (1997) ; Maureen S. Dorney, *Privacy and the Internet*, 19 Hastings Comm/Ent L.J. 635 (1997) ; Gene Barton, *Taking a byte out of crime : E-mail harassment and the inefficacy of existing law*, 70 Washington L.Rev. 465 (1995).

[31] Mark S. Kende, *The Supreme Court's approach to the First Amendment in cyberspace : free speech as technology's hand-maiden*, 14 Constitutional Commentary 465 (1997).

[32] Gene Barton, *Taking a byte out of crime : E-mail harassment and the inefficacy of existing law*, 70 Washington L.Rev. 465 (1995).

[33] Joshua A. Marcus, *Commercial Speech On The Internet : Spam and the First Amendment*, 16 Cardozo Arts & Entertainment 245 (1998) ; Jonathan Byrne, *Squeezing Spam Off the Net : Federal Regulation of Unsolicited Commercial E-mail*, 2W. Va. J. L. & Tech. 4 (1998) ; David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L. Rev. 1001 (1997) ; Anne Wells Branscomb, *Anonymity, autonomy, and accountability : challenges to the First Amendment in cyberspace*, 104 Yale L. J. 1639 (1995).

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[34] Anne Wells Branscomb, *Anonymity, autonomy, and accountability : challenges to the First Amendment in cyberspace*, 104 Yale L. J. 1639 (1995).

[35] *Id.*; *See* also, Rowan v. U.S. Post Office Department, 397 U.S. 728 (1969). The Supreme Court said in this case that the right of a person privacy must be placed in the scales with the right of others to communicate. Even though people are inescapably captive audiences for many purposes, a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.

[36] 397 U.S. 728 (1969).

[37] *Id.* at 736-737 (1969).

[38] Branscomb, *supra* note 34.

[39] Telephone Consumer Protection Act, 47 USC § 227 (1991), TCPA was enacted to prohibit the use of recorded sales calls unless the recording is preceded by a live operator who obtained the receiver's consent, and also TCPA prohibits sending unsolicited advertisement via fax machine.

Branscomb's article was not focused on junk email issue, main purpose of her article was to explore the First Amendment issues surrounding cyberspace. One of the most recent articles that discussed directly about First Amendment and other legal issues relating to spam is Joshua A. Marcus' article[40] published in *Cardozo Arts & Entertainment.* Reviewing cases relating to the First Amendment and commercial speech, he argued that the regulation of spam could be constitutional and proposed a legal frame work for it.[41] He argued that the spam could be regulated to prevent cost-shifting from advertisers to consumers. Using the four-part test of *Central Hudson*, he argued that some other purpose like aesthetics or privacy could not pass the four-part test.[42] He said if the governments' interest is aethethic, the regulation could not meet the second prong, that is whether the governmental interest of regulating commercial speech is substantial or not, of the four-part test because all of previous cases whose aims were to promote aesthetics deal with the problems of billboards or signs, and arguments in previous cases could not be analogized to the Internet.[43] Even though we agree that the purpose of protecting aethethic pass the second prong, he argued, it can not pass the third prong, because the government can not prove in a material way that the regulation directly advances its interest.[44]

On the contrary, Jonathan Byne in his article "Squeezing Spam Off the Net" argued that the bills currently pending in Congress that propose to regulate unsolicited commercial electronic mail because of cost-shifting might not pass the fourth-prong of *Central Hudson*, that is the regulation must be least restrictive alternative.[45] He argued that even though a few argue that prohibiting spam would advance the interest of preventing cost-shifting, whether the federal bill is tailored narrowly enough is not certain. There are various computer programs that can be used to filter the unsolicited commercial electronic mail either by the end user or the ISP (Internet Service Provider), and the existence of these filters would seem to suggest that the federal statutes could not pass the fourth-prong of *Central Hudson*.[46]

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[40] Joshua A. Marcus, *Commercial Speech On The Internet : Spam and the First Amendment*, 16 Cardozo Arts & Entertainment 245 (1998).
[41] *Id.*
[42] *Id.* at 298-302.
[43] *Id.* at 298-299.
[44] *Id.*

Unlike these two articles, David E. Sorkin's article[47] in the *Buffalo Law Review* proposed that the Telephone Consumer Protection Act of 1991 could be construed to prohibit unsolicited commercial electronic mail. Comparing the unsolicited commercial email advertising to unsolicited fax advertising, he argued that because both fax and email advertising share many of the same characteristics -- cost shifting, inconvenience -- and because the primary basis for the prohibition of unsolicited fax advertising was the cost shifting, the Telephone Consumer Protection Act of 1991 could be used to applied to regulate unsolicited commercial electronic mail.[48]

Though there are several articles exploring the legal issues surrounding the Internet and a couple of articles exploring the legal issues about spam, these articles did not specifically discuss the state statutes regulating unsolicited commercial electronic mail. Instead, those articles either examined Internet regulation in general or proposed a legal frame work for regulating spam.

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[45] Jonathan Byrne, *Squeezing Spam Off the Net : Federal Regulation of Unsolicited Commercial E-mail*, 2W. Va. J. L. & Tech. 4 (1998).
[46] *Id.*
[47] David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L. Rev. 1001 (1997).
[48] *Id.*

In sum, even though some articles relevant to this study discussed legal issues regarding spam and the Internet and analyzed federal statutes forbidding unsolicited commercial electronic mail, they did not offer a detailed analysis of federal and state statutes and bills regulating unsolicited commercial electronic mail. This study will analyze the all the federal and state statutes and bills regulating unsolicited commercial email and explore the constitutionality of those statutes and bills.

Research Questions

This paper will address the following questions :

1. What are the differences and similarities among the federal and state statutes and bills regulating or proposing to regulate unsolicited commercial email?

What are the legal issues raised by the state and federal bills and statutes?

2. Can those statutes and bills pass the four-part test of *Central Hudson*?

3. What other issues should be considered to test the constitutionality of state and federal statutes and bills regulating unsolicited commercial message through the Internet?

Analysis of Federal and State Statutes and Bills

The rationales for regulating unsolicited commercial email are to prevent cost-shifting from advertisers to consumers, to stop inconvenience, and to protect privacy.[49] First cost-shifting. Actually the cost of receiving email through the Internet depends on the recipient's way of accessing the Internet. Most users with dial-up connections pay either an hourly rate or monthly rate. The recipients who pay an hourly rate will be more sensitive to cost-shifting concerns than the recipients who pay a flat monthly rate. The users need more extra time to download the email messages from the hosts if they have many junk emails, and this means the users who pay an hourly rate will pay more if they have more messages to be downloaded from the hosts. The cost-shifting concerns are well presented in Representative Smith's (Democrat - New Jersey) introductory statement :

> The Internet and email are becoming part of our everyday lives. And no one--from the consumer to the small business who run servers--should be forced to pay for unsolicited advertisements. The idea of shifting the financial burden of speech on to an unwilling audience is one that needs to be addressed. From the netizen who may incur costs in the form of charges spent online reading and disposing of the messages to users who assume the costs of both accessing and storing mail they did not want, consumers should not be unwilling, and paying, recipients. Furthermore, junk emailers occupy time and space on an Internet Service Provider's servers and forces the ISP to make technical improvements. The cost of these improvements are passed on to the consumer. In effect, the consumer is paying to have their privacy breached and invaded.[50]

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[49] David E. Sorkin, *Unsolicited Commercial E-Mail and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L. Rev. 1001 (1997) ; and *see also* Maureen S. Dorney, *Privacy and the Internet*, 19 Hastings Comm/Ent L.J. 635 (1997) ; also Gene Banton discussed the email Harassment in "*Taking A Byte out of Crime : Email Harassment and the Inefficacy of Existing Law*". Banton argued that the regulation of email should include the email harassment. According to Banton, harassment includes "massive mailing of vituperative" especially targeted to women, and mail bomb or letter bomb. Banton argued that this email harassment should be handled criminally, not in a civil.

[50] H.R.1748 ; 105th Congress 1st Session.

Second, inconvenience. Junk email can be inconvenient for recipients, if the sender uses a vague or misleading messages to conceal the nature of the messages. In this case, the recipient is forced to examine the text of the message to figure out if it is advertising, and as the result it takes more time to figure out than clear advertising messages. Anti-spammers argue that the time for evaluating the junk message should be included in the cost. Because the junk emails usually look like a ordinary message, and it takes more time to figure out if it is advertising message or not. Therefore, the users have to pay more than they usually pay if the message is clear.

Third, privacy concerns. The Electronic Mailbox Protection Act[51] says that "because of recipients of unsolicited electronic mail are unable to avoid the receipt of such mail through reasonable means, such mail may threaten the privacy of recipients. This privacy threat is enhanced for recipients whose electronic mail software or server alerts them to new mail as it arrives, as unsolicited electronic mail thereby disrupts the normal operation of the recipient's computer." This privacy concerns more likely happen in a transaction through the Internet than usually in receiving the junk emails from advertisers. Anti-spammers, however, argue that their email addresses are personal information and email addresses should be protected as personal privacy.

Federal Statutes and Bills

So far, there were seven federal bills that aim to regulate unsolicited commercial email via the Internet. One of them was enacted in 1998.[52] First, the bill which was sponsored by Senator Frank H. Murkowski (Republic - Alaska) was introduced on May 21, 1997.[53] This bill, the 'Unsolicited Commercial Electronic Mail Choice Act'[54] aimed to regulate the transmission of unsolicited commercial electronic mail. This bill does not prohibit the unsolicited commercial email, instead require the emailers to follow requirements :

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[51] S. 875 ; 105th Congress 1st Session, Sec. 2.

[52] The bills pending in Congress are ; "Netizens Protection Act of 1997", "Electronic Mailbox Protection Act of 1997", "Data Privacy Act of 1997", "E-Mail User Protection Act of 1998", "Digital Jamming Act of 1998", and "Unsolicited Commercial Electronic Mail Choice Act of

> a person who transmits an electronic mail message as part of the transmission of unsolicited commercial electronic mail should include the term 'advertisement', name, physical address, electronic mail address, and telephone number of the person who initiates transmission of the message.[55]

It also requires the FCC to seek injunctions and fines up to $ 11,000 against commercial emailers who disregard law.[56] And part of this bill was accepted in 'Anti-Slamming Amendments Act'[57] which was also introduced by Senator Murkowski and was passed in Senate on May 12, 1998.

Also in 1997, the Netizens Protection Act[58] was introduced by Representative Christopher H. Smith (Democratic - New Jersey). This bill would amend the Communications Act of 1934 to ban unsolicited commercial electronic mail. This bill makes it unlawful for any person within the United States to use any computer or the electronic mail address of an individual with whom the sender lacks a pre-existing and ongoing business or personal relationship unless such individual provides express invitation or permission.[59]

1997". Part of "Unsolicited Commercial Electronic Mail Choice Act" was accepted in "Anti-Slamming Amendments Act" and Anti-Slamming Act was passed in Senate on May 12, 1998.

[53] S. 771 ; 105th Congress.

[54] *Id.*

[55] *Id.* at Sec. 3 (a) (1).

[56] *Id.* at Sec. 4 (a) (1).

[57] S. 1618 ; 105th Congress.

[58] H.R. 1748 ; 105th Congress.

[59] *Id.*

Thus, this bill prohibits an unsolicited commercial email. Because no one can send the commercial email unless there is an personal relationship.

Soon after the Netizens Protection Act, the Electronic Mailbox Protect Act was introduced in Congress by Senator Robert Torricelli (Democratic - New Jersey).[60] Its main purpose is to promote online commerce and communications, and to protect consumers and service providers from the misuse of computer facilities by junk emailers.[61] It would not prohibit the unsolicited electronic mail, but rather purported to promote online commerce.[62] In this bill, whoever ...

> 1) initiates the transmission of an unsolicited electronic mail message from an unregistered or fictitious Internet domain
> 2) uses a computer program or other technical mechanism or procedure to disguise the source of unsolicited electronic mail messages for the purpose of preventing recipients
> 3) initiates the transmission of an unsolicited electronic mail message and fails to comply with the request of the recipient of the message to cease sending messages in the future
> 4) distributes a collection or list of electronic mail addresses, having been given prior notice that one or more of the recipients identified by such address does not wish to receive unsolicited electronic mail[63]

shall be subject to a civil penalty of $5,000 per individual violation.[64] This bill unlike the 'Netizens Protection Act' which prohibit all spam, would regulate only certain spamming activities.[65]

The bill Data Privacy Act[66] was introduced by Representative William Tauzin (Republican - Louisiana) on July, 1997. Data Privacy Act aims to provide self-regulation for a computer interactive services industry and to protect the privacy of interactive computer service users.[67] It requires an emailer to reveal his trade name, physical address, email address, and phone number,[68] and it also requires commercial emailers to offer opt-out options for recipients.[69] Actually, this bill focuses on protecting privacy concerns which might be happened when people use the interactive computer services.

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[60] S. 875 ; 105th Congress.
[61] *Id.*
[62] *Id.*
[63] *Id.* at Sec. 3.
[64] *Id.*
[65] *Id.*
[66] H.R. 2368 ; 105th Congress.

Email User Protection Act and Digital Jamming Act were introduced in 1998. Email User Protection Act was introduced to amend the Communications Act of 1934 in order to prohibit any person from intentionally sending the transmission of unsolicited commercial email from an unregistered or fictitious Internet domain, from directing an unsolicited commercial email message to subscribers of an interactive computer service, and from accessing the server of a service and using a computer program to collect email addresses of service subscribers.[70]

The Digital Jamming Act[71] was also introduced to amend the Communications Act of 1934 to protect consumers against 'spamming', 'slamming', and 'cramming'. This bill makes it unlawful for any person to initiate spam messages, unless a message contains specified information – the name, street address, email address, and telephone number, unless a message contains Internet routing information that is accurate, valid, and correctly reflects the actual message routing.[72]

State Statutes and Bills

Currently 16 states – Alaska, California, Colorado, Connecticut, Kentucky,

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[67] *Id.*
[68] *Id.* at Sec. 2.
[69] *Id.*
[70] H.R. 4124 ; 105th Congress and H.R. 4176 ; 105th Congress.
[71] H.R. 4176 ; 105th Congress.
[72] *Id.* at Sec. (e).

Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Virginia, Washington, and Wisconsin – have statutes and bills which was enacted already or pending in state congress.[73] Out of 16 states, five states - Colorado, Maryland, Nevada, Virginia, and Washington - have enacted their own statutes for regulating unsolicited commercial message through the Internet.

Alaska : A bill requires commercial emailers to clearly identify that the message advertisement, to identify their business name and email address, and to include opt-out instructions.[74]

California : The Internet Consumer Protection Act,[75] which was enacted in August in 1998, prohibits sending an unsolicited advertisement to an electronic mail address unless commercial emailer has a preexisting and ongoing business or personal relationship with the recipient, and even if emailers can send the electronic advertisement, emailers should clearly provide, at the beginning of the unsolicited advertisement, the date and time the message was sent, the identity of the person sending the message, and the return email address.

Connecticut : A state bill clearly prohibits any unsolicited advertisement by electronic mail unless the recipient concede to receive that advertisement.[76]

Kentucky : A bill requires emailers to identify their legal name, street address, email address, phone number, and to include opt-out instructions.[77]

Maryland : The statute prohibits a person from intentionally using an electronic mail device for the purpose of commercial solicitation.[78]

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[73] *See* details at "http://www.jmls.edu/cyber/statutes/email/state.html".
[74] Alaska House Bill 491.
[75] California Assembly Bill 1629 "Internet Consumer Protection Act".
[76] Connecticut House Bill 6558.
[77] Kentucky Bill Resolution No. 337.

Massachusetts : A bill introduced to amend 'General Law' would prohibit a person from sending or causing to be sent unsolicited electronic mail to solicit the purchase of real property, goods, or services.[79]

Nevada : A bill was introduced to make it a crime to send unsolicited commercial email absent a preexisting business relationships, however, it was enacted to permit unsolicited commercial email if it includes the sender's name, address, email address, and opt-out instructions.[80]

New Hampshire : Unsolicited commercial electronic mail is prohibited unless the recipient wishes to receive unsolicited commercial electronic mail.[81]

Especially, New Hampshire State bill defines the unsolicited commercial electronic mail very broadly including any material requesting donations as commercial electronic mail.[82]

New Jersey : State statute prohibits sending an unsolicited electronic mail unless the recipient has consented to receive or unless the person sending a commercial message has preexisting and ongoing business relationship with the recipient.[83]

New York[84] and North Carolina[85] regulate the unsolicited email advertisements through requiring emailers to provide legal name, street address, email address, phone number, and opt-out instructions. But both states do not prohibit unsolicited email advertisements.

Rhode Island : A bill was introduced to prohibit unsolicited electronic advertising which

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[78] Maryland House Bill 140.
[79] Massachusetts House Bill 4581.
[80] Nevada Senate Bill No. 13.
[81] New Hampshire House Bill 1633.
[82] *Id.* at Chapter 359-G:3.
[83] New Jersey Assembly No. 295.
[84] New York Senate Bill 3524.
[85] North Carolina House Bill 1744.

electronically transmits information in any form through connection with a telephone or computer network.[86]

Virginia : A bill requires the ISP(Internet Service Provider) to determine the types or categories of unsolicited electronic mail or messages that subscribers do not wish to receive.[87] So, in Virginia the providers should be responsible for unsolicited electronic mail. And this bill was enacted in late February, 1999.

Wisconsin : A bill prohibits a person from making an electronic mail solicitation without the consent of the person solicited.[88]

Comparison between federal and state statutes and bills

Definition of unsolicited electronic mail advertisement

Usually federal and state statutes define unsolicited electronic mail advertising as "any electronic mail message that advertise/solicit the purchase or rental of, or investment in, property, goods or services."[89] E-Mail User Protection Act uses a broader definition than other statutes, that is, "unsolicited commercial email message means any electronic mail other than - a) electronic mail sent by persons to recipients with whom they have a direct or indirect relationship, including a prior business relationship, or b) mail sent by a source to a recipient where such recipient, or someone authorized by him, has at any time affirmatively requested communications from that source."[90] Some states define more broadly than federal bills and statute.

New Hampshire's[91] bill defines the unsolicited commercial electronic mail more broadly than any other state statutes and bills by including donation requests into commercial solicitation.

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[86] Rhode Island Senate Bill 1073.
[87] Virginia House Bill No. 1325.
[88] Wisconsin Senate Bill 283.
[89] For example, 'Digital Jamming Act', H.R. 4176 ; 105th Congress, Sec. 101. (6).
[90] H.R. 4124 ; 105th Congress, Sec. 3. (9) (A) (B).

Neither federal nor state statutes and bills clearly stated how many recipients unsolicited electronic commercial electronic mail must have in it to be junk email. Only Electronic Mailbox Protection Act[92] defines unsolicited commercial email that is sent to 25 or more recipients as junk email.

Level of Regulation

The remarkable difference between federal and state statutes is the level of regulation. All federal bills and statute except 'Netizens Protection Act'[93] permit junk email if the sender follows the bills' and statute's requirements. Usually, the federal bills and statute require the junk emailers to provide certain informations -- legal business name, business address, return address, phone number, and opt-out instructions. Anti-spammers severely argue that these requirements could give legal authorization to junk emails, because junk emailers can send if they follow the requirements. Thus they argue that junk email problem would be more serious than before.

State statutes, however, have more strict restrictions on sending junk emails, and over the half of the states prohibit sending junk emails. 10 states out of 17 states,[94] which have bills and statutes regulating unsolicited commercial electronic mail, prohibit a person from sending junk email unless a person has a preexisting and ongoing business relationship, or unless the recipients concede to receive junk email.

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[91] New Hampshire House Bill 1633, Chapter-G:3.

[92] S. 875 ; 105th Congress, Sec. 7.

[93] H.R. 1748 ; 105th Congress.

[94] Alaska, California, Connecticut, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, Rhode Island, and Wisconsin.

Constitutionality Analysis

Before analyzing the constitutionality of federal and state statutes regulating unsolicited commercial electronic mail, it is necessary to review the Supreme Court's commercial speech doctrine -- its views on First Amendment protection for commercial speech -- because this paper will use the *Central Hudson* four-part test as a tool for analyzing the constitutionality of federal and state statutes.

In the *Central Hudson* case, the Supreme Court set the standards for determining if the regulation of commercial speech is constitutional.[95] The Supreme Court said that in commercial speech cases, to determine whether the expression is protected by the First Amendment, a four-part test should be applied.[96] First, does it involve lawful activity and is it truthful and not mislead the audience? Second, does the government have a substantial interest in restricting the commercial speech? Third, does the regulation directly advances the governmental interest? Fourth, is the regulation more extensive than necessary to serve that interest?[97]

In this case, the Court said, applying the fourth prong, that there has not been any proof that a more limited restriction on the content of promotional advertising would not serve adequately the state's interest.[98]

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[95] 447 U.S. 557 (1979).
[96] *Id.*
[97] *Id.*
[98] *Id.* ; After the *Central Hudson* case, the four-part test was used to determine whether a Puerto Rican statute prohibiting casinos from advertising gambling in Puerto Rico is constitutional. The Supreme Court ruled that advertising of casino gambling could be banned because casino gambling itself could be banned. And the Supreme Court said that it was up to the legislature to choose suppression over a less speech-restrictive policy. The results of *Posadas* substantially reduced the First Amendment protection for commercial speech, because the Supreme Court uphold the government authority for regulation of truthful advertising.

Trend in current cases

The four-part test of *Central Hudson* case was again applied in *Rubin v. Coors Brewing Co.*[99] The Court ruled that a federal ban on disclosure of the alcohol content of beer on labels failed to pass the third and fourth prongs. The Supreme Court said that although the government's interest was substantial, the federal ban could not directly and materially advance its interest because of the overall irrationality of the government's regulatory scheme.[100] Also, the ban was more extensive than necessary since available alternatives to the labeling ban – including directly limiting the alcohol content of beers, prohibiting marketing efforts emphasizing high alcohol strength, limiting the ban to molt liquors – could prove less intrusive to the First Amendment's protections for commercial speech.[101]

After *Rubin*, commercial speech protection was reaffirmed in *44 Liquormart Inc. v. Rhode Island*.[102] The Supreme Court reversed the First Circuit's decision, stating that the state bore the burden of proof to show that its regulation would advance its interest to a material degree.[103] The Supreme Court said Rhode Island failed to show that ban on price advertising could significantly reduce alcohol consumption.[104] Furthermore, the Court said that the ban on price advertising is more extensive than necessary to serve its stated interest.[105]

Rubin and *44 Liquormart* have special meaning for commercial speech protection. In both cases, the Supreme Court required the government to show that its ban on advertising would further its interest in a material way. Especially, in *44 Liquormart*, the Court rejected the assumption of *Posadas* that "the greater power to ban casino gambling necessarily includes lesser power to ban advertising casino gambling".[106] The Court in *44 Liquormart* rejected the assumption that "words are necessarily less vital to freedom than actions, or the logic that the power to prohibit an activity is necessarily greater than the power to suppress speech about it."[107] Therefore, the Court concluded that speech restrictions could not be treated as simply another means that the government might use to achieve its ends because the First Amendment directs that government may not suppress speech as easily as it may suppress conduct.[108]

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[99] 115 S.Ct. 1585 (1995).
[100] *Id.*
[101] *Id.*
[102] 116 S.Ct. 1495 (1996).
[103] *Id.*
[104] *Id.*
[105] *Id.*

- **Does the speech concern lawful activity and not mislead ?**

Since this paper focuses on the constitutionality of regulation of unsolicited commercial electronic mail, this paper uses the 'cost-shifting' and 'privacy protection' issues relating to regulating junk email as testing the constitutionality. Because almost all federal and state statutes stated that their purposes are to protect consumers from having to bear the costs of third-party advertising and protect consumer's privacy. Even though legal scholars argue that inconvenience should be included as a rationale for regulating junk email,[109] it was not clearly stated in the purpose of regulation.

The determinant of whether expression is eligible in the First Amendment protection is that the speech 'must concern lawful and truthful activity and not be misleading'.[110] Under the first part of the *Central Hudson* test, commercial expression entitled to constitutional protection must promote products and services that are lawful. Therefore, commercial message for fraud and deceptive product, or commercial message for obscene materials are outside constitutional consideration because they promote illegal products or services.

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[106] 106 S.Ct. at 2979 (1986).
[107] 116 S.Ct. at 1512 (1996).
[108] *Id.*
[109] David E. Sorkin, *Unsolicited Commercial Email and the Telephone Consumer Protection Act of 1991*, 45 Buffalo L.Rev. 1001 (1997). Sorkin argued that like junk fax, junk email could make consumers be inconvenient because junk email usually uses a vague or misleading subject to conceal the nature of the message. And this forces the recipient to examine the text of the message in order to determine its relevance and this cause inconvenience.

In this first part of test, several statutes that have broad definition of unsolicited commercial electronic mail - -for example, the E-Mail User Protection Act and New Hampshire -- have some problems. New Hampshire bill includes any material requesting donations as commercial electronic mail. In *New York Times v. Sullivan*, the Supreme Court said the ad which communicate information, express opinion, recite grievances, protest claimed abuses, and seek financial support was protected political speech, even though it is paid by the advertiser.[111] So, what if material requesting donations is related to political matters? In that case, New Hampshire's statute is regulating the content of political expression, and strict scrutiny must be applied to that case.[112]

The first part of tests will be easily passed if the junk emailers promote legal products or services and if they do not use false or misleading advertising message.

Cost-Shifting Issue

- Substantial government interest and direct advance

Under the *Central Hudson*, the second and third criteria of the test are whether a regulations serve a substantial government interest and the regulations directly advance that interest.[113] The asserted government interest is important in order to justify the need for regulation, and also plays a crucial role in determining the third and fourth prongs of test.

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[110] 447 U.S. at 566 (1980).
[111] 376 U.S. at 266 (1964) ; 1 Media L.Rep. 1527 (1964).
[112] Kent R. Middleton, Bill F. Chamberlin & Matthew D. Bunker, *The Law of Public Communication*, Fourth Edition, Longman, 1996.

The cost-shifting issue arose from *Destination Ventures LTD. v. FCC.*[114] *Destination* was a challenge to the Telephone Consumer Protection Act of 1991 (TCPA) that prohibits using a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine. In *Destination Ventures*, the U.S. District Court in Oregon said that 'Congressional efforts to protect consumers from harm -- economic and otherwise -- and its interest in the relationship between advertiser and consumer is well-established'.[115] The court also said that 'these costs are borne by the recipient of the fax advertisement regardless of their interest in the product or service being advertised'.[116] The District Court ruled that Congress' interest in protecting consumers from the economic harm resulting from the unfair shifting of the cost of advertising from the advertiser to the unwitting customer is substantial government interest, and that subsequently banning of those unsolicited faxes directly advances its interest.[117] Also, the District Court ruled that the regulation was sufficiently tailored to advance its interest and not more extensive than necessary.[118]

An appeals court upheld the decision, ruling that advertisers had no right to shift the cost of their marketing onto consumers by using the consumers' fax paper.[119]

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[113] 447 U.S. at 566 (1980).
[114] 844 F.Supp. 632 (D.Or. 1994).
[115] *Id.* at 635.
[116] *Id.* at 636.
[117] *Id.* at 637.
[118] *Id.* at 637.
[119] Destination Ventures, Ltd. v. FCC, 46 F. 3d 54 (9th Cir. 1995).

On appeal, Destination argued that advertising messages were no more costly to consumers than non-commercial messages and therefore should not be singled out. The court, however, ruled that unsolicited fax advertisements were responsible for most of the cost shifting and that congress had a substantial interest in reducing the amount.[120] Even though this case did not reach the Supreme Court, it is clear that the purpose of regulating unsolicited commercial electronic mail is a substantial government interest and therefore can satisfy the second and third prongs of *Central Hudson* test.

Privacy Protection Issue

The other major purpose of regulating unsolicited commercial email is privacy protection.

- Substantial government interest and direct advance

The legal concept of a right of privacy developed only after the mass media, corporations, and government agencies became powerful enough to threaten individual privacy.[121] The first case related to privacy protection from commercial speech was *Rowan v. U.S. Post Office Department.*[122] *Rowan*, who is in the mail order business, filed the suit to challenge the constitutionality of the Postal Revenue and Federal Salary Act of 1967 that requires the sender to remove the addressee's name from his mailing lists and stop all future mailings to the householder when the addressee request. *Rowan* argued that this section violated his right of free speech and due process guaranteed by the First and Fifth Amendments. *Rowan* also argued that this section was unconstitutionally vague and ambiguous.[123]

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[120] *Id.* at 56.
[121] Wayne Overbeck, *'Major Principles of Medial Law'*, Harcourt Brace College Publishers, 1998, 158-194.
[122] 397 U.S. 728 (1970).

The Supreme Court said that "the right of every person to be left alone must be placed in the scales with the right of others to communicate."[124] The Court said that even though people are inescapably captive audiences for many purposes these days, a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.[125] The Court ruled that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee, and the mailer's right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.[126] Also, the Court said that "nothing in the constitution compels us to listen to or view any unwanted communication, whatever its merit."[127]

However, in *Bolger v. Youngs Drug Products Corp.*, the Supreme Court upheld a District Court's decision that a federal law[128] that prohibits the mailing of unsolicited advertisements for contraceptives was more extensive than necessary to advance the interests asserted by the government.[129] The Court said that Young's advertising for contraceptives not only implicated substantial individual and societal interests in the free flow of commercial information, but also related to activity that was protected from unwanted governmental interference.[130] With regard to appellant's assertion that the statute shields recipient of mail from material that they are likely to find offensive, the Supreme Court said that offensiveness was classically not justification validating the

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[123] *Id.* at 731.
[124] *Id.* at 736.
[125] *Id.* at 736.
[126] *Id.* at 737.
[127] *Id.* at 737.
[128] 39 U.S.C § 3001 (e) (2).
[129] 463 U.S. 60 (1982).
[130] *Id.* at 69.

suppression of expression protected by the First Amendment.[131] Also, the Court said that recipients might effectively avoid the unwanted mail simply by averting their eyes, therefore the "short journey from mailbox to trash can is an acceptable burden so far as the constitution is concerned".[132]

So, in *Bolger*, the Court ruled that the governmental interest was not substantial. This suggests that the purpose of regulating unsolicited commercial electronic mail to protect privacy from intrusive unwanted commercial email is not a substantial government interest. If the advertisers send commercial email which contains substantial individual and societal interests in the free flow of commercial information, the government interest of privacy protection can not pass the second prong. That is, it can not be said that it is substantial enough to allow the restrictions on the speech. The Supreme Court clearly declared that informational ad can not be characterized merely as proposals to engage in commercial transaction, and the reference to a specific product does not by itself render the advertisement commercial speech.[133] Therefore, the same restrictions on commercial speech can not be applied to informational advertisement.

Other issues that should be considered to assess the constitutionality of regulating unsolicited commercial electronic mail

- **Blanket Ban Issue**

There are problems with statutes which have blanket bans on unsolicited commercial email. Most of federal and state statutes define unsolicited commercial electronic advertising as "any unsolicited electronic mail message that is sent for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or service."[134] However, some statutes define unsolicited commercial electronic advertising more broadly as "any electronic mail over than electronic mail sent by persons to other with whom they have a prior relationship, including a prior business relationship, or mail sent by a source to recipients where such recipients, or someone authorized by them, have an any time affirmatively requested to receive communications from that source."[135]

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[131] *Id.* at 71.
[132] *Id.* at 72.
[133] *Id.* at 66.

In *Bolger v. Youngs Drug Products Corp.*, Youngs argued that its proposed mailings constitute fully protected speech because it contained the useful information about protecting consumers from venereal disease.[136] And the Supreme Court, citing the commercial speech definition of *Virginia Board of Pharmacy*, said that even though Youngs' pamphlets are conceded to be advertisement and Youngs referred its products in that pamphlets, Youngs' informational pamphlets can not be characterized merely as proposals to engage in commercial transactions.[137] Moreover, the Court said that economic motivation for mailing the pamphlets was not sufficient by itself to turn the materials into commercial speech.[138]

Therefore, the broad definition of unsolicited commercial electronic mail could be problematic in this sense because it could be non-commercial speech according to its information content.

In *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held that the state's blanket ban on advertising prices of prescription drugs violated the First Amendment.[139] The Supreme Court said that both the individual consumer and society in general might have strong interests in the free flow of commercial information.[140] The Court said :

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[134] For example, 'Netizens Protection Act', H.R. 1748 ; 105th Congress.
[135] For example, 'E-Mail User Protection Act', H.R. 4124 ; 105th Congress.
[136] 463 U.S. 62, at 65-66 (1982).
[137] *Id.* at 66.
[138] *Id.* at 67.

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[141]

- **New Media Issue**

Another major issue surrounding the Internet is new medium issue. Because it is new and it has fundamental differences from traditional media, some argue that the media differences should be considered in determining whether or how it can be regulated.

The landmark case relating to the Internet, which also reached the Supreme Court, is *Reno v. ACLU*.[142] ACLU filed suit challenging the constitutionality of provisions of the Communications Decency Act (CDA), which sought to protect minors from harmful material on the Internet. In trial, a U.S. District Court in Pennsylvania held that provisions of the CDA violated the First Amendment.[143] Especially, the District Court's analyses of the Internet was applied to *Shea v. Reno*[144] case, and to the Supreme Court's decision of *Reno v. ACLU*.[145] Judge Dalzell, in his "medium specific analysis", said that because the Internet is very different from other media -- broadcasting and print

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[139] 425 U.S. 748 (1976).
[140] *Id.* at 762-765.
[141] *Id.* at 765.
[142] 929 F.Supp. 824 (E.D.Pa. 1996) ; and 117 S.Ct. 2329 (1997).
[143] 929 F.Supp. 824 (E.D.Pa. 1996).
[144] 930 F.Supp. 916 (S.D.N.Y. 1996).
[145] 117 S.Ct. 2329 (1997).

-- different approach should be applied to the Internet.[146] Judge Dalzell said that the Internet has four different characteristics from other media. First the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available. Fourth, the Internet provides significant access to all who wish to speak in the medium and even creates a relative parity among speakers.[147] Dalzell concluded that "the Internet may fairly be regarded as a never-ending worldwide conversation. The government may not interrupt that conversation. As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."[148]

The Supreme Court, in a 7-2 decision, ruled the CDA unconstitutional. Justice Stevens said in his conclusion that "the government apparently assumes that the unregulated availability of indecent and patently offensive material on the Internet is driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material. We find this argument singularly unpersuasive. The dramatic expansion of this new marketplace of ideas contradicts the factual basis of this contention. The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[149]

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[146] *Id.* at 872-78.
[147] *Id.* at 877.
[148] *Id.* at 883.

Conclusion and Discussion

This paper examined the characteristics and rationales of both federal and state statutes and bills that aim to regulate and to prohibit unsolicited commercial electronic mail via the Internet. Findings show that most of bills and statutes have "cost-shifting prevention" and "privacy protection" as rationales for regulating unsolicited commercial email. Also, findings show that there are some differences between federal and state statutes and bills regarding to the definition of unsolicited commercial email and level of regulation. According to findings, federal statute and bills are more generous to commercial message through the Internet than state statutes and bills. Furthermore, this paper examined whether the rationales and legal issues proposed by both federal and state bills and statutes regulating unsolicited commercial electronic mail via the Internet can pass the *Central Hudson* test. The result shows that the purpose of cost-shifting prevention from advertisers to consumers can pass the Central Hudson test. As discussed above, the *Destination Ventures LTD. v. FCC*[150] case can be a strong precedent for the constitutionality of those bills and statutes regulating unsolicited commercial electronic mail via the Internet. In *Destination Ventures*, court ruled that Congress' interest of protecting consumers from the economic harm inflicted by advertisers is substantial government interest, and banning of those unsolicited commercial message through fax machine can directly advance its interest. On the contrary, the result show that privacy protection issue can not pass the four-part test because of court's split decision about this issue. In *Rowan*, the Supreme Court ruled that privacy protection can be a substantial government interest, but in *Bolger*, the Supreme Court ruled that prohibiting the mailing

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[149] Reno v. ACLU, 117 S.Ct. at 2351 (1997).

[150] 844 F.Supp. 632 (D.Or. 1994).

of unsolicited advertisements for contraceptives was more extensive than necessary.

Furthermore, this paper shows that the bills and statutes that have blanket ban over unsolicited commercial electronic mail would be a problematic in cases in which advertisers send the informational type of commercial email to recipients. This is according to the Supreme Court's decision in *Bolger v. Youngs Drug Products Corp.*

Also, the Supreme Court's approach to the Internet shows that the Supreme Court would give highest protection to the Internet. Because in *Reno*, the U.S. Supreme Court declared that the Internet deserved the highest protection from the governmental intrusion.

News or Nuisance? Regulation of Home Delivery of Free Newspapers

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A paper presented to the Law Division of AEJMC
1999 Annual Convention
New Orleans

News or Nuisance? Regulation of Home Delivery of Free Newspapers

Implicit in the First Amendment is the right to distribute information, including newspapers. If a government stops the action of the messenger, the message itself becomes useless because it does not reach the reader or listener. As the U.S. Supreme Court ruled more than a century ago, "liberty of circulating is as essential to (free expression) as liberty of publishing; indeed, without the circulation, the publication would be of little value."[1] Like other First Amendment rights, however, the right of distribution is by no means absolute, and governments from the federal to local level have attempted to regulate distribution of information with varying degrees of success.

Newspaper distribution is one of the areas in which such regulation has been imposed. Newspapers use three primary modes of distribution: people hired as carriers for delivery to homes and as "hawkers"[2] for single-copy sales on street corners and other locations; newsracks[3] and newsstands; and delivery through the U.S. postal system. Governments continue to implement laws and regulations concerning distribution in each of these areas, and many times newspapers fight them in court, arguing that the regulations violate the First Amendment.

One legal battleground in this ongoing dispute involves home delivery of free newspapers. Typically, these publications appear on doorsteps and porches once or twice a week, whether or not residents have requested them. With interests of homeowners in mind, some municipalities have viewed the newspapers as a nuisance and have crafted regulations limiting their distribution. For example, in 1998, the City Council in Pasadena,

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[1] Ex Parte Jackson, 96 U.S. 727 (1878).

[2] "Hawkers" are people who sell newspapers on street corners and other locations.

[3] "Newsracks" are coin-operated vending machines used to sell newspapers, although occasionally papers at such machines are free.

Calif., backed an ordinance banning the delivery of newspapers to property owners who do not want them.[4] The city said residents have a right not to be bothered by unsolicited information at their homes. Under the ordinance, newspaper carriers cannot deliver to residents and businesses that put their names on a "refusal list" kept by the city. Violation of the law is a misdemeanor.

Using case law, this paper will examine legal disputes between publishers and municipalities over regulations on delivery of free newspapers. It will attempt to shed light on the issue of free expression on the doorstep of a private residence; in addition, the paper will provide advice to publishers on how they can avoid potentially costly litigation. The paper begins with a background section discussing the relevant legal concepts involved in this type of newspaper distribution. A review of scholarly literature follows, as does a section on the study's methodology, research questions and scope. An in-depth examination of the relevant cases will then lead to the paper's conclusion.

Background

Having established the right of distribution in the 19th century, the Court has further elaborated, expanded and articulated this right, particularly in a series of cases involving the Jehovah's Witnesses. This religious sect's insistence on handing out pamphlets and circulars led to a number of decisions that helped define the parameters of the right of distribution on public property. A key ruling came in *Lovell v. City of Griffin*,[5] in which the Court struck down an ordinance requiring written permission from the city manager to distribute literature in Griffin, Ga. The Court declared the ordinance invalid on its face as a prior restraint on distribution. In *Schneider v. State*,[6] the Court reinforced *Griffin* by rejecting an ordinance on distribution of leaflets on the public streets of Milwaukee, Wis. The municipality argued that the regulations were necessary to prevent litter, but the Court turned down that argument, instructing the municipality to penalize those who commit the actual littering.

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[4] *Delivery of Unsolicited Fliers, Newspapers Banned*, L.A. TIMES, June 24, 1998, at B4.
[5] 303 U.S. 444 (1938).

In another case involving the Jehovah's Witnesses, *Cantwell v. Connecticut*,[7] the Court established an important concept, an idea that continues to affect newspaper distribution and other forms of free expression: that a municipality under some conditions can regulate the time, place and manner of First Amendment activity. The Court amplified that view a few years later in *Martin v. City of Struthers*,[8] a case that concerned door-to-door solicitation. Through these cases and more contemporary ones such as *Heffron v. International Society of Krishna Consciousness*,[9] the Court established a "time, place and manner" test that is in place today. This four-part test is important to this study because it is often employed when courts consider regulations of the time, place and manner in which newspapers reach readers. The Supreme Court has established the following test to determine whether a regulation is a valid restriction on the time, place and manner of a particular type of speech:

1) the regulation must be content neutral, not discriminating against a particular viewpoint;

2) it must serve a significant government interest, such as public safety;

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[6] 308 U.S. 147 (1938).

[7] "It is equally clear that a state may … regulate the times, places and the manner of soliciting upon its streets … to safeguard the peace, good order and comfort of the community." 310 U.S. 296, 304 (1940).

[8] 319 U.S. 141 (1943).

[9] 452 U.S. 640 (1981) (upholding rules on where charitable, political and religious groups could distribute information at a state fair).

3) the regulation must be narrowly tailored to further that significant government interest;

4) alternative means must be available for the speech to take place.

By no means a comprehensive explanation, this background discussion of the time, place and manner test focuses on aspects of particular importance to the topic of this paper. An awareness of the origins and purpose of the test assists in understanding the details of the resolutions of conflicts discussed later in the paper and in the literature review, which follows.

Literature Review

Although many scholars have looked at newspaper distribution and newsracks,[10] few have examined the other means of getting newspapers to their readers. No literature was found on home delivery of newspapers, and few articles exist on regulations of "hawkers." Literature on the time, place and manner test of a broader scope is available, however.

The following review of the relevant literature will provide further background and context on the nature of the conflict between governments' power to regulate and newspapers' right to distribute. First, two articles specifically pertaining to newspaper delivery by hawkers will be examined. Then, this literature review will analyze more broadly focused articles that look at how courts have applied the time, place and manner test in cases involving free expression at a person's home. Although not specific to the topic of this paper, this literature is relevant because this is the type of First Amendment activity that distributors of free newspapers engage in.

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[10] *See* Peter Ball, *Extra! Extra! Read All About It: First Amendment Problems in the Regulation of Coin-Operated Vending Machines*, 19 COLUM. J.L. & SOC. PROB. 183 (1985); George E. Stevens, *Newsracks and the First Amendment*, 66 JOURNALISM Q. 930 (1988); Donna Lee Dickerson, *Newsrack Regulation: Lakewood and Beyond*, 1989 COMM. & LAW 3 (1989); Anthony Barlow, *Licensing of Newspaper Vending Machines*, 58 U. CIN. L. REV. 285 (1989); David C. Knieriem, *Diminishing the First Amendment Rights of Newsracks*, 37 WASH. U.J. URB. & CONTEMP. L. 243 (1990); Michael Pavlick, *No News(rack) Is Good News?*, 40 CASE W. RES. L. REV. 451 (1990); Heidi C. Fletemeyer, *The First Amendment and Newspaper Vending Machine Regulation*, 69 U. COLO. L. REV. 223 (1998).

In a law review article about regulation of "hawkers" who roam streets and neighborhoods to sell newspapers, James B. Spamer argues that traffic laws specifically aimed at newspaper sales should be met with constitutional resistance.[11] He analyzes a 1981 case involving a Houston ordinance that made it illegal for hawkers to sell newspapers to people in cars, regardless of whether the car was moving or parked.[12] The city said that the vendors presented a traffic hazard. Spamer writes that a Texas state court ruled the ordinance unconstitutional because it was overbroad, but he pointed out that a better written ordinance could be upheld because there might be legitimate concerns about traffic safety. In his view, however, the decision failed to clearly address what rights newspaper peddlers have because it used decisions upholding billboard regulations as precedents. He urged the courts to return to the issue to confront what rights publishers have to distribute their newspapers through vendors on the streets.

A more recent article discusses the validity of a license fee on newspaper hawkers.[13] Author Tasha Blakney analyzes a case involving the city of Cleveland's law requiring to obtain a $50 license and to carry identification while selling newspapers, among other activities.[14] The Northeast Ohio Coalition for the Homeless challenged the law, arguing that it violated the First Amendment rights of homeless people in Cleveland to sell its publications such as The Homeless Grapevine. A federal appeals court ruled that the law was permissible under the time, place and manner test – a decision the author criticizes.[15] To Blakney, the license regulation is one in a string of oppressive policies that

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[11] James B. Spamer, *Traffic Regulations Cannot Duly Curtail the Free Speech Right To Circulate Publications*, 13 TEX. TECH. L. REV. 1512 (1982).

[12] Houston Chronicle Co. v. City of Houston, 620 S.W.2d 833 (1981).

[13] Tasha Blakney, *Prior Restraint of Speech and Time, Place and Manner Restrictions*, 65 TENN. L. REV. 1049 (1998).

[14] Northeast Ohio Coalition for the Homeless v. City of Cleveland, 105 F.3d 1107 (6th Cir. 1997).

[15] Blakney, *supra* note 13, at 1063.

Cleveland has imposed against the homeless. "This ruling strips away the freedom of expression from a segment of Cleveland's population, namely its homeless population, which is without resources to assure that it will continue to be heard," she writes.[16] She argues that the court gave short shrift to the fourth prong of the time, place and manner test, the one requiring that alternative channels of communication be available to offset the effect of the regulation. Blakney writes that it is "financially impossible" for Cleveland's homeless to establish another way to distribute newspapers besides street sales.[17]

Three other articles address the use of the time, place and manner test in regards to other types of free expression that takes place at a person's doorstep. These activities include protests at the homes of abortion providers and public officials as well as door-to-door distribution of religious tracts.

Sara Simrall Rorer examines the use of the time, place and manner test in regulations restricting door-to-door political speech.[18] She takes an in-depth look at a 1986 case, *City of Watseka v. Illinois Public Action Council*, which involved an Illinois town's requirement that solicitors must register with the city clerk.[19] In addition, the town restricted the times that canvassers could visit homes. The intent of the regulations, according to the town, was to prevent crime and fraud. Describing the court's decision as burdened by "strained reasoning," Rorer explains how a federal appeals court rejected the regulations because the town failed to show a relationship between its restrictions on solicitors and its interest in crime prevention.[20] "This case illustrates the imperfection in any system of categorization of speech restrictions that must address the frequent conflicts between the interests of speakers to freely disseminate their ideas and the interests of the community to preserve order," she says.[21] Rorer includes a plea for more guidance from the U.S. Supreme Court to end the "obvious confusion" in the lower courts.[22]

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[16] *Id.*

[17] *Id.* at 1065.

[18] Sara Simrall Rorer, *Freedom of Speech Protection of Door-to-Door Religious or Charitable Solicitation*, 56 U. CIN. L. REV. 1115 (1988).

[19] 796 F.2d 1547 (7th Cir. 1986).

[20] Rorer, *supra* note 18, at 1134.

In another article, Anne D. Lederman also discusses First Amendment activity in the environs of a person's home.[23] Specifically, she is concerned with the issue of demonstrations at a private residence. Her article examines the U.S. Supreme Court's decision in *Frisby v. Schultz* [24] in which a Wisconsin town, reacting to a demonstration at the home of a doctor who performed abortions, passed an ordinance banning residential picketing. The Supreme Court upheld the law, finding it narrowly tailored to further the town's interest of ensuring privacy and tranquility in its neighborhoods. "The home," Lederman writes, "constituted a sanctified realm, the tranquility and privacy of which supported a ban on residential picketing."[25] Lederman notes, however, that the Court "maintained that the residential privacy interest was not absolute."[26] Demonstrations at a private residence can essentially trap someone in his own home, according to the author, and "because of this entrenchment, the invasion by the speech poses a particularly severe psychological threat."[27]

Hazel A. Landwehr also addresses the issue of anti-abortion demonstrations at private residences.[28] She criticizes the Supreme Court's ruling in *Frisby*, saying it is "easily evaded" by abortion foes who protest at doctors' homes.[29] She argues that the right of privacy is especially important in the modern age in which the marketplace of ideas has become "a cacophony of competing messages, opinions and ideas [that] vie for our allegiance."[30] For Landwehr, the home is a sanctuary from this marketplace, and government should ensure that residents can enjoy shelter from it if they desire. She asserts that prohibition on this type of speech is permissible because abortion opponents have other ways to get out their message. Landwehr asserts that disruptive protests at residences are ultimately counterproductive to the marketplace of ideas: "Without opportunities for quiet reflection and private self-examination, people cannot be expected to formulate informed opinions or to adopt coherent positions from the vast array of opinions competing for their allegiance."[31]

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[21] *Id.* at 1135.

[22] *Id.* at 1138.

[23] Anne D. Lederman, *Free Choice and the First Amendment, Or Would You Read This If I Held It In Your Face and Refused To Leave*, 45 CASE W. RES. L. REV. 1287 (1995).

[24] 487 U.S. 474 (1988).

[25] Lederman, *supra* note 23, at 1309.

[26] *Id.* at 1311.

[27] *Id.* at 1323.

[28] Hazel A. Landwehr, *Unfriendly Persuasion: Enjoining Residential Picketing*, 48 DUKE L.J. 147 (1993).

[29] *Id.* at 150.

In sum, the literature offers a range of viewpoints on regulations on speech and the use of the time, place and manner test. Some scholars, such as those writing specifically about newspaper distribution by hawkers, argue that restrictions are unfair and excessive. Others, however, say that speech takes place in front of a person's home or at their doorstep merits restriction by government.

Research Questions, Methodology and Limitations

This paper will add to existing scholarly research on newspaper distribution as well as time, place and manner restrictions on free expression by examining cases involving regulations on home delivery of free newspapers. The questions that will guide the discussion are as follows:

1) What types of regulations have municipalities imposed on delivery of free newspapers, and for what reasons have they imposed them?
2) How have the regulations fared in court, and why?
3) How has the application of the time, place and manner test affected home delivery of free newspapers?

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[30] *Id.* at 157.
[31] *Id.* at 188.

4) Based on these court decisions, what can newspaper publishers do to avoid clashes with municipalities while engaging in their right of distribution?

The methodology of this paper is analysis of contemporary court opinions on the federal and state levels. Legal decisions from the 1970s, '80s and '90s regarding regulations affecting home delivery of free newspapers are examined. Because of the different status of commercial speech, this paper will not examine unsolicited distribution of advertising materials, including newspaper-like "shoppers," to homes. In addition, newsracks and other modes of distribution (such as the Internet) are outside the bounds of this study.

Case Discussion

Eight cases were found from the time period covered in this study concerning home delivery of free newspapers. Of the eight, in four the significant government interest primarily used to defend the regulation was the privacy of the homeowners. In four others, the interest was public safety, i.e., the effort to stop crime and fraud in neighborhoods. Some cases involved multiple government interests, but even these had a primary focus on a particular theme, be it privacy or public safety. This study will examine the cases based on these significant interests, both of which courts have said are constitutionally valid concerns of governments.

Homeowner privacy

In two cases on the state level, municipalities used anti-littering ordinances to limit distribution of free newspapers, asserting that free newspapers created litter at the homes of residents and therefore invaded their right to privacy. In both cases, the courts rejected the regulations.

In *Van Nuys Publishing Co. v. City of Thousand Oaks*, the California Supreme Court considered a city ordinance that required newspaper deliverers to obtain permission from homeowners before leaving newspapers on their doorsteps.[32] Violation of the law was a misdemeanor. The city of Thousand Oaks, Calif., passed the ordinance to reduce litter at people's homes and to allow residents to stop unwanted materials from being delivered.

The court agreed with the city that laws to prevent littering in residential neighborhoods were "increasingly needed,"[33] and it also acknowledged that "personal privacy takes on special significance in the context of private residences."[34] The court, however, expressed concerns that the law was not narrowly drawn enough to further these goals, an important aspect of the time, place and manner test. "The present penal enactment goes substantially beyond what is necessary to achieve the city's anti-littering objective, and in doing so, treads directly on First Amendment rights," it ruled.[35]

The problem with the ordinance lay in its requirement that newspaper carriers first get the permission of a homeowner before delivery could take place. In the court's view, this went too far in trying to protect the privacy of residents:

> The instant ordinance, however, goes considerably beyond preserving a homeowner's individual choice, since it prohibits distribution to those occupants who have raised no objection to the material as well as those who have. Instead of merely protecting the 'unwilling listener,' as the city

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[32] 5 Cal. 3d 817 (1971).
[33] *Id.* at 821.
[34] *Id.* at 825.
[35] *Id.* at 828.

> contends, the present ordinance thus impairs a distributor's opportunity to 'win the attention' of all uncommitted 'listeners.'[36]

The court suggested that it would be open to an ordinance that prohibited delivery of free newspapers to residents who had expressed an objection to them. Such a law would shift "the intitial burden" to homeowners and away from newspaper carriers.[37]

A New Jersey court ruled similarly in another state case, *Toms River Publishing Co. v. Mannasquan.*[38] At issue was an anti-littering ordinance in Mannasquan, N.J., that required carriers to obtain permission of residents before delivering free newspapers. City leaders said the ordinance was necessary to protect the right of privacy of individuals.[39] The publishers of The Reporter newspaper challenged the constitutionality of the regulation. Citing the *Thousand Oaks* case, the New Jersey court found that the ordinance was not a sufficiently narrow fit to its interest in protecting residents' privacy. "Its impact is far broader than is necessary to achieve those ends and is, in fact, so broad as to interfere with the freedoms of speech and press," the court said.[40]

The third case on the state level in which privacy was an issue is something of an anomaly because it involves a homeowner suing a newspaper distributor. In *Tillman v. Distribution Systems of America Inc.*, a New York man sued the distributors of a free newspaper called This Week.[41] Although no specific regulation was involved, the homeowner said the repeated delivery of the newspaper -- despite his numerous requests for delivery to be ended -- resulted in litter piling up at his doorstep. A New York appeals court was sympathetic to his complaint. "The right to publish, distribute and sell a newspaper does not correspond to the 'right' to force others to buy or read whatever one has written," the court said.[42] Distribution Systems can certainly enjoy a right to distribute This Week, the court said, but it cannot bombard "innocent homeowners" who have made repeated requests that delivery be stopped.[43] The court ordered Distribution Systems to end delivery of This Week to the Tillman household.

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[36] *Id.* at 826

[37] *Id.*

[38] 127 N.J. Super. 176 (1974).

[39] *Id.* at 184.

[40] *Id.* at 187.

[41] 25 Media L. Rep. (BNA) 1110 (1996).

The fourth case in which privacy was the government interest took place in federal court: *Distribution Systems v. Village of Old Westbury*, in which a municipality expressed concerns over privacy in defending its regulation on newspaper delivery.[44] In this dispute, the distributors of This Week were again in court, this time challenging a New York town's requirement that carriers not bring papers to residents who have filed a "no delivery" notice with the town clerk. Among the justifications the town of Old Westbury offered was that the law was necessary to protect residents' privacy rights. Old Westbury argued that delivery of unwanted newspapers created a burden on a homeowner in the same way that a demonstration outside a home would.

The court, however, discarded this line of reasoning. "The court believes the village trivializes the right of privacy by equating the leaving of an unsolicited newspaper on a resident's porch to the kind of privacy intrusion that occurs when someone pickets outside a resident's home," it ruled.[45]

This court, too, found that the regulation was a poor fit to the problem expressed by town leaders: "The ordinance sweeps with a broad brush and cuts away at the First

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[42] *Id.* at 1115.
[43] *Id.*
[44] 862 F. Supp. 950 (E.D.N.Y. 1994).
[45] *Id.* at 959.

Amendment's protection of a free press by precluding efforts to distribute information."[46] Because the regulation was not narrowly tailored to fit the interest of residential privacy, it failed to overcome a legal challenge.

Overall, the cases involving regulations on newspaper delivery with privacy as the government interest at stake offer a less-than-clear picture of judicial thinking. Courts on both the state and federal level agree that residential privacy is a legitimate interest, but in some of these decisions, the regulation has failed to be narrowly tailored to fit that interest, as required by the time, place and manner test. Practically speaking, courts lean toward placing the burden of dealing with unwanted delivery of free newspapers on the resident. They are comfortable with government taking on that burden. The courts appear to be saying that they want newspapers to have an opportunity to reach a potential reader, and if once a reader wants to reject that publication after having that chance, the reader can act accordingly.

Public Safety

Four cases – two from the state level and two in federal district court -- involve delivery regulation based on the governmental interest of public safety. Courts have recognized that governments may in some cases rein in free expression to safeguard public safety, i.e., to fight crime and fraud, and to ensure the smooth flow of traffic. Such regulations, however, must still pass the other prongs of the time, place and manner test.

In *Ad World v. Doylestown*, a Pennsylvania town said a regulation on newspaper delivery was necessary to prevent crime and vandalism.[47] To that end, Doylestown leaders passed Ordinance 117 prohibiting door-to-door distribution of free newspapers, saying that such publications sitting on porches and hanging on doorknobs sent a signal to thieves that residents were not at home. Ad World Inc., the publisher of a weekly, tabloid-size newspaper called Piggy Back, challenged the ordinance.[48]

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[46] *Id.* at 961.

[47] 672 F.2d 1136 (3rd Cir. 1982).

The federal appeals court examining the case acknowledged that Doylestown certainly had an interest in stopping crime in the community. The court questioned, however, whether Ordinance 117 was sufficiently tailored to further that interest. Doylestown failed to show a link between home break-ins and delivery of free newspapers, according to the court. "It has provided no evidence of a strong connection between accumulation of papers and the incidence of burglary," it said.[49] As in other rulings, the courts turned to the homeowner for the solution to unwanted newspapers: "Putting the onus on the homeowner to cure the burglary problem may be appropriate."[50] Because Doylestown was unable to show a relationship between home delivery and crime, the court rejected the regulation. "A time, place and manner regulation must be precisely drawn, however, and Ordinance 117 is not."[51]

In addition, the court found that the ordinance did not leave adequate alternative means of communication for Ad World to get its paper to readers, another requirement of the time, place and manner test. "In the face of plaintiff's unrebutted evidence that alternatives to courier delivery are in terms of both time and money prohibitively expensive. Doylestown has made no such showing," the court said.[52] Thus, Ordinance 117 failed two prongs of the time, place and manner test.

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[48] Despite the name of the plaintiff in the case, the court found that the publication in question in the case was not commercial speech, which receives diminished First Amendment protection. Therefore, it treated Piggy Back as it would any newspaper.

[49] 672 F.2d at 1140.

[50] *Id.* at 1141.

[51] *Id.* at 1142.

Another case with public safety as the governmental interest is *No. J. Newspapers v. Kenilworth*.[53] At issue was a regulation in Kenilworth, N.J., prohibiting the throwing or dropping of an object (such as newspapers) from a moving vehicle. The publisher of a biweekly newspaper called The Suburban News challenged the law after a carrier received a ticket for littering while driving down a Kenilworth street and tossing newspapers onto lawns of homes.

Kenilworth asserted that it needed the law to ensure safe driving, but a New Jersey court expressed doubts. It said the town had other ways to prevent car accidents:

> The court notes Kenilworth's observation that an individual throwing newspapers from windows of a moving vehicle is either not paying attention to where the newspapers are being thrown or not paying attention to the road. However, defendant's public safety concerns may be more efficiently remedied by enforcement of a careless-driving statute.[54]

Interestingly, the *Kenilworth* court found that carriers in cars had several alternative means to distribute their newspapers. For example, they could use "pedestrian distribution, bulk mailing and making copies available for pick-up by customers."[55] Although it passed this prong of the test, the court said Kenilworth should use more "precise instrument" to prevent any safety problems presented by newspaper carriers driving cars.[56] It therefore enjoined the use of this prohibition on the throwing of objects by newspaper carriers.

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[52] *Id.*
[53] 254 N.J. Super. 166 (1991).
[54] *Id.* at 170.
[55] *Id.* at 169.
[56] *Id.*

The town of Old Westbury, N.Y., offered public safety as its interest in implementing a license requirement on newspaper carriers in *Distribution Systems v. Old Westbury*.[57] The town, which was involved in another distribution dispute in an identically titled case discussed earlier in this paper, said the licensing requirement would assist in its efforts to stop crime in its affluent neighborhoods. Mayor Gilbert Colombo said many of the homes have long, curvy driveways and bushes and trees that make for easy hiding places for thieves. By requiring carriers to have licenses, the town asserted, it could differentiate the legitimate newspaper carrier from the prowler. Distribution Systems, the distributors of the publication This Week, disagreed and challenged the law.

The court, citing the *Ad World* decision, found fault with the idea that licensing carriers could make a difference in the rate of residential burglaries. Indeed, it had grave concerns about a public official being in charge of who and who will not receive a license to engage in First Amendment activity, namely newspaper delivery. "There is nothing in [the ordinance] that prevents content censorship, particularly with such an open-ended provision allowing screening for 'such other information as the Board of Trustees may require,' " the court said. "With this kind of licensing qualification, the village can reject an applicant for any reason."[58] Because of the possibility that the licenses could be handed out based on the content of the carrier's newspaper, the court rejected it.

The most recent case involving the government interest in public safety is *Fresno v. Press Communications Inc.*, decided by a state appellate court.[59] The city of Fresno, Calif., had an ordinance prohibiting door-to-door distribution of unauthorized newspapers and advertisements if a resident posted a sign to that effect. The Fresno ordinance also made it illegal to deliver an unauthorized newspaper or advertisement if it was obvious that a resident had not picked up the previous delivery. As other cities have done, Fresno asserted that piles of newspapers on doorsteps could lead to home break-ins; it also said the unwanted newspapers and advertising fliers amounted to nothing more than litter.

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[57] 785 F. Supp. 347 (E.D.N.Y. 1992).

[58] *Id.* at 356.

The publishers of Metronews, a weekly newspaper in the Fresno area, easily won a challenge against the ordinance because it was clearly not content-neutral.[60] The city allowed distribution of unauthorized religious tracts or campaign literature to residents, but did not allow the same distribution for newspapers. Fresno made the mistake of grouping newspapers with advertisements, a mistake that in the view of the court was fatal to the regulation. "[Fresno] does not have the authority to decide what categories of speech are more or less important or desirable and to use the government's enforcement power to restrict the distribution of these categories of written material," the court said.[61] Indeed, the court wondered why unauthorized newspapers would lead to greater crime while unauthorized religious pamphlets would not. Because it so readily failed to pass the prong of content neutrality, the Fresno regulation was found invalid, and the court did not address other issues of the time, place and manner test.

These cases show that regulations based on public safety as the significant government interest often fail to overcome constitutional hurdles. In each case, the court in question rejected the restriction on the right of carriers to deliver free newspapers to homes. Courts seem skeptical of the idea that restrictions on newspaper distribution are necessary in the fight against crime. They want municipalities to show clearly that a link exists between piles of newspapers on a resident's porch and home break-ins, but such a

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[59] 23 Media L. Rep. (BNA) 1174 (1994).

[60] *Id.*

link has yet to be established. Furthermore, these cases show that courts continue to resist licensing schemes and content-based regulations affecting newspaper distribution.

Conclusions

This analysis of cases involving delivery of free newspapers should prove instructive to municipalities and newspaper publishers alike. These cases show the hazards of implementing regulations that are not narrowly tailored to the recognized government interests of safeguarding public safety and the right of privacy. As the federal appeals court in the *Ad World* decision pointed out, these regulations must be worded very specifically to pass constitutional muster. This is the main area in which these regulations fail – they are simply not worded carefully enough. Licensing requirements that vest power into the hands of a few public officials will be met with great skepticism, as will restrictions that appear to single out free newspapers while allowing other publications to continue to be distributed. Publishers should be aggressive in combating such restrictions.

Courts have placed the decision of whether a free newspaper is worth receiving in the hands of the resident rather than the government. This tilt toward residents over the government seems appropriate. The marketplace of ideas, after all, is powered by the transactions of ordinary citizenry, not the government. A resident can either "buy" the ideas offered in a free newspaper by taking it into the home or pass them by placing it into the trash.

That said, newspaper publishers would be wise to acknowledge the wishes of those who do not wish to "buy" the ideas of their free newspapers. Therefore, if a person who has received a newspaper at his home prefers not to receive it again, the publisher should

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[61] *Id.* at 1177.

no longer deliver it. Indeed, publishers should avoid situations like that in the *Tillman* case, which interestingly is the single case in this paper in which a publisher lost. Continuing to deliver a paper that is so obviously unwanted is disrespectful and foolish, and ultimately, not good business.

"Moral rights" versus amoral rights, "fair dealing" versus "fair use": A comparison of the copyright statutes of Canada and the United States

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Submitted April 1, 1999
to the Research section of the Law Division,
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Abstract

The Canadian "fair dealing" copyright provision is not as broad as the U.S. "fair use" doctrine, but Canadian "moral rights" provisions are broader. Why do these important distinctions exist? What is the potential impact on these neighbors' shared intellectual property markets? This paper examines the historical development of the U.S. and Canadian copyright acts and the cultural bases for these differences. These distinctions subtly reflect an international split on how copyrights should be conceived.

In the United States, a controversial "rap" musical group, 2 Live Crew, wrote and performed a parody of Roy Orbison's 1964 rock hit, "Oh, Pretty Woman." Clearly, the woman described by 2 Live Crew did not resemble the romantic female image Orbison strove to create. Enough of 2 Live Crew's song, however, sufficiently resembled Orbison's hit so that: 1. audience members clearly could make the parody connection, and 2. the current owners of copyrights to Orbison's song sued. Ultimately, the U.S. Supreme Court concluded that 2 Live Crew's use of portions of Orbison's song was a "fair use" as outlined in section 107 of the U.S. Copyright Act.[1] The Court reasoned, in part, that economic market value of Orbison's song had not been harmed since the two versions of the song clearly appealed to different consumers. If no economic damage had been done, what complaint did the "Pretty Woman" owners really have? None, or at least none recognized by the philosophy behind U.S. copyright law, which even today does not include any "moral rights" except for visual artists.

In Canada, the copyright song is not played the same way. The Canadian "fair dealing" provision[2] is not as broad as the United States' "fair use" provision.[3] The Canadian provisions outlining "moral rights" and the "nature of right of integrity"[4] apply to a broader range of works than the limited U.S. "moral rights" provision protecting visual artists.[5] The outcome of the *Campbell* case most likely would have been completely opposite if Canadian courts would have had jurisdiction over the matter.

Why do such distinctions exist between the laws of two peoples who both started as British subjects under British common law? What is the potential communication impact considering the intellectual property markets shared across the Canadian/U.S. border? What are the legal and cultural bases for the differences between these two copyright approaches?

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[1] *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994)

[2] Section 27(2) of the Canadian Copyright Act, R.S.C. 1985, c. C-42. See Appendix B of this paper.

[3] U.S. Copyright Act of 1976, as amended, 17 U.S.C. §107. See Appendix C of this paper.

[4] Sections 14.1(1) and 28.2(1) of the Canadian Copyright Act, R.S.C. 1985, c. C-42. See Appendix A of this paper.

This paper will examine the historical development of the U.S. and Canadian copyright acts and focus on the two major areas where the countries seem to apply different policy goals: 1. moral rights and 2. the Canadian copyright defense of “fair dealing” versus the U.S. defense of “fair use.” To some extent, the distinctions between Canada and the United States on these two issues subtly reflect what some commentators perceive to be a two-way, international split on how copyrights should be conceived. This paper will describe this international split before its analysis of the U.S./ Canadian comparison.

The relation of copyright laws and national culture

All laws in some way reflect the values and culture of the society that produced them. For this reason, comparison of an area of law from the perspective of two countries is a useful way of examining the values and culture of those two countries. This is particularly true in the area of copyrights, a field of law integrally tied to culture. As U.S. legal scholar Paul Goldstein writes, “Copyright touches directly on conflicting cultural, economic, and political values — the desire for art and literature; a commitment to free markets; traditions of free speech.”[6]

On one hand, copyright law is the engine that helps drive development of culture. Several Canadian legislators recognized that economically, copyright law “helps reinforce and sustain those who develop and nurture the cultural goods that the nation approves of and enjoys.”[7] In a 1985 report, members of a Canada House of Commons sub-committee called copyright a “tool of cultural policy ... indispensable to any cultural policy that is based on diversity, freedom of expression and the creation of works which express our culture.”[8] The range of cultural arenas copyright laws touch is vast, “as varied as the tastes

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[5] U.S. Copyright Act of 1976, as amended, 17 U.S.C. §106A. See Appendix C of this paper.

[6] Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox 38 (1994).

[7] A Charter of Rights for Creators: Report of the Sub-committee on the Revision of Copyright, Standing Committee on Communications and Culture, Canada House of Commons (October 1985) (hereinafter 1985 Canadian Sub-Committee Report)

[8] *Id.*

present in the communities making up the nation."[9] In both Canada and the United States, copyright cases involve a vast array of cultural products, from cartoons and cookbooks to college texts and computer programs.[10]

Copyright laws not only have an impact on the creators of culture, but on the consumers and the economics of their transactions. As several Canadian legislators noted, "Copyright affects everybody. It gives basic protection to individual creators who work with their minds and their imaginations. ... Copyright is also big business."[11] Just after World War II, "intellectual property" (including patents, trademarks and copyrights) made up less than 10 percent of all U.S. exports. In 1994, some experts estimated that it made up more than 50 percent of all U.S. exports.[12] As of 1985, almost 500,000 Canadians were directly employed in broadcasting, book publishing, journalism, film and television production, music publishing, sound recording, and advertising. Canadian legislators recognized that "[a]ll these industries depend on the law of copyright to protect the works that are the basis of their commercial existence."[13] Goldstein called U.S. copyright unique in how it supplies the framework between producers and consumers, thereby connecting supply with demand.[14]

For almost three centuries, copyright laws throughout the world have helped order markets for information and entertainment. According to Goldstein, no other body of law "occupies this special place in ordering a nation's culture, high and low, and in helping to preserve authorial autonomy."[15] This special role for copyright law is increasingly important as technology quickly alters and expands the means and reach of communication.[16] Copyright law, primarily, will determine who pays for the bright new cultural world. Legislators trying to draft an effective domestic copyright law in both the United States and in Canada face additional challenges raised by a complicated "patchwork quilt" of international copyright law and the increase of international trade in cultural products.[17]

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[9] *Id.*

[10] Goldstein, *supra* note 6, at 5.

[11] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at xi.

[12] Richard E. Vaughan, *Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say "Property"? A Lockean, Confucian, and Islamic Comparison,* 2 ILSA J. of Int'l & Comparative Law 307, 311 (1996).

[13] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at xi.

[14] Goldstein, *supra* note 6, at 35.

[15] Goldstein, *supra* note 6, at 35.

The ease with which communication and cultural products cross international borders is part of what makes a comparison of the copyright laws of Canada[18] and the United States[19] fruitful. The importance of trade between two nations with such a lengthy border also raises the stakes on copyright issues. Further, because the legal systems of the two countries share the same British common law heritage, their copyright laws could be quite similar. However, important distinctions between the two laws exist, particularly in some key areas of policy and copyright theory.

Internationally, two copyright "cultures"

What should copyright law protect? Who should it protect? As Goldstein asks: "Is copyright an *author's* right, giving the originator a claim on every market in which consumers will pay for copies? Or is it a *user's* right, entitling the user to enjoy a copy free unless the author and his publisher can show that, if they are not paid, they will have no incentive to create and publish new works?"[20] These largely unresolved questions trigger debate reflecting different cultural perspectives. Goldstein described an insightful exchange that typifies the international split of opinion. African scholars were arguing that copyright should protect indigenous folklore, often hundreds of years old, against appropriation by publishers in industrialized countries. "When an American copyright expert challenged an Egyptian folklore advocate — 'Surely, folklore is in the public domain' — the Egyptian replied icily, 'Public domain is a *very* Western concept.'"[21] Which concept of copyright prevails depends on many factors, especially a nation's cultural attitudes.[22]

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[16] Goldstein, *supra* note 6, at 28.
[17] Goldstein, *supra* note 6, at 27.
[18] [Canadian] Copyright Act, R.S.C. 1985, c. C-42.
[19] U.S. Copyright Act of 1976, as amended, 17 U.S.C. §§ 101-810.
[20] Goldstein, *supra* note 6, at 37. (Emphasis added.)

Several legal scholars divide the world into two camps based on different copyright philosophies. One camp is generally represented by France (and other countries following the European continental civil law tradition) and the other camp by the British-heritage common law nations, particularly the United States. Each camp seems to justify its copyright laws using a different theoretical notion of what "right" should be protected. These theoretical differences are often reflected in the way each camp accepts or rejects the French notion of "moral rights" or the U.S. doctrine of "fair use."[23] According to Goldstein, the European justification for copyright law focuses on an author's perceived "natural right" to control use of his or her work. He notes that in many European nations, the name of statutes protecting literary and artistic works translates to "author's rights," not "copyright" — *droit d'auteur* in France, *Urheberrecht* in Germany, *diritto d'autore* in Italy, *derecho de autor* in Spain.[24] These terminology distinctions are more than word play, according to U.S. legal scholar Marshall A. Leaffer. These distinctions reveal "a fundamental difference in attitude."[25] The European civil law tradition ties "author's rights" to the author's persona. Under this tradition, Leaffer explains, an author's work is "an extension of his or her personality which springs into existence by a personal act of creation. ... [A]n author is deemed to have a moral entitlement to control and exploit the product of his or her intellect."[26]

While the civil law tradition views "author's rights" as tied to the author's persona, the common law "copyright" approach is inherently impersonal and removed from the author. According to Leaffer, U.S. copyright law "connotes a negative right, the right of the owner to prevent copying of this work."[27] This copyright approach provides financial rewards to someone producing the work and its ultimate goal is to encourage production and thereby enhance public welfare. Leaffer sees this goal as essentially economic[28] as does Goldstein: "[T]he American culture of copyright centers on a hard, utilitarian calculus that balances the needs of copyright producers against the needs of copyright consumers, a calculus that appears to leave authors at the margins of the equation."[29]

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[21] Goldstein, *supra* note 6, at 14-15.
[22] Goldstein, *supra* note 6, at 14.
[23] Goldstein, *supra* note 6, at 168.
[24] Goldstein, *supra* note 6, at 168.
[25] Marshall A. Leaffer, UNDERSTANDING COPYRIGHT LAW (2D) 3 (1995).
[26] Leaffer, *supra* note 25, at 3.

This two-camp view of copyright is somewhat simplistic. It ignores the similarities between various copyright acts. It ignores divisions of legal theoretical thought within nations.[30] It ignores decisions made by lawmakers not out of policy concerns but out of economic concerns about trade issues. It assumes that the framers of the first British copyright law had a theoretical justification in mind when they created the Statute of Anne in 1731, an assumption challenged by at least one legal scholar, Richard Wincor. "Early copyright was engendered by technology, an unenlightened reflex to the invention of printing. Nobody sat around puffing on pipes and raising the great question why products of the mind ought to attract lesser protection than things corporeal. ... [B]ooks in print opened or betrayed a legal void which had to be filled."[31]

However, the two-camp view does seem to adequately describe some aspects of international copyright positions. While European, Asian, and Latin American nations have copyright laws that in many ways seem similar to U.S. law, their copyright laws are founded on the natural rights philosophy.[32]

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[27] Leaffer, *supra* note 25, at 3.

[28] Leaffer, *supra* note 25, at 3.

[29] Goldstein, *supra* note 6, at 168.

[30] Even U.S. legal scholars and legislators disagree among themselves about the appropriate focus for U.S. copyright laws. Goldstein describes two groups: the copyright "optimists" and "pessimists." Optimists "assert that copyright is rooted in natural justice, entitling authors to every last penny that other people will pay to obtain copies of their works." Pessimists "accept that copyright owners should get some measure of control over copies as an incentive to produce creative works, but they would like copyright to extend only so far as is necessary to give this incentive, and treat anything more as an encroachment on the general freedom of everyone to write and say what they please." Goldstein, *supra* note 6, at 15.

[31] Richard Wincor, *Unrest on the Frontiers of Copyright*, 16(3) Comm. & L. 83, 84 (1994).

[32] Goldstein, *supra* note 6, at 26.

Some aspects of the French copyright philosophy will be echoed in Canadian legislative history, discussed below, including the French doctrine of moral right — *droit moral* — which gives authors control over what they create by allowing them to prohibit anyone, even their own publishers, from changing their works in any way that might affect their artistic reputation. This French concept of moral rights is intended to protect the "intimate bond" between an author's work and his or her personality.[33]

For the most part, the United States historically has not followed the French lead, especially in regards to the scope of protection given moral rights, as will be discussed in further detail below. Instead, the U.S. position on moral rights seems to reflect its own national cultural perspective and the economic focus of its copyright laws. As Goldstein noted: "When Congressman Richard Gephardt introduced a bill in 1987 to prohibit the unauthorized alteration of motion pictures, including their colorization, most observers correctly predicted that the bill would not pass. In 1989, in the United States at least, Ted Turner could say, 'I think the movies look better in color, pal, and they're my movies.'"[34]

Historical background of U.S. and Canadian copyright laws

Some of the early influences on U.S. and Canadian copyright laws in part reflect the international two-camp approach described above. However, even this international dual-nature took some years to develop. At first, copyright laws in both France and England came as responses to government licensing, royal monopolies and state literary censorship.[35] In 1476, William Caxton introduced the printing press into England. In 1534, a royal decree prohibited any publishing without a license and approval from official censors. The Crown gave a London guild of printers and booksellers, called the Stationer's Company, a publishing monopoly. In 1695, official licensing to publish expired. Fearing new competition, the Stationer's Company persuaded Parliament to pass its first copyright act, called the Statute of Anne, in 1710. This statute gave the stationers rights in work already printed; rights in new works, however, were granted to the authors.[36]

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[33] Goldstein, *supra* note 6, at 166, quoting the words of a French scholar.
[34] Goldstein, *supra* note 6, at 166.
[35] Goldstein, *supra* note 6, at 170-171.

In the beginning of copyright, as now, technological advances such as the printing press helped create the need for copyright laws. The development of a mass reading audience, Goldstein explained, created the need for a copyright mechanism. "[A]s movable type brought literature within the reach of everyone, and as the preferences of a few royal, aristocratic, or simply wealthy patrons were supplanted by the accumulated demands of mass consumers, a legal mechanism was needed to connect consumers to authors and publishers commercially."[37]

At first, copyrights addressed only the ability to copy written works and aimed only at stopping unauthorized exact replications. Starting in the mid-nineteenth century, protection was expanded. Copyright owners could stop publication not only of verbatim copies but also of imitations, adaptations and translations.[38] The French focus on author-centered moral rights arrived later, developing gradually over the course of the nineteenth century.[39]

When the United States first began drafting its copyright law, it looked to the British Statute of Anne. Establishment of copyright law came quickly to the new republic. By 1786, all 13 states except Delaware had their own copyright laws. The U.S. Constitution of 1787 set out Congressional jurisdiction: "To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[40] When Congress in 1790 passed the first U.S. copyright law, it rejected the French approach of granting copyright protection without regard to any formality. Congress instead modeled its 1790 Act on the British Statute of Anne, lifting almost verbatim the British registration, duration term, and notice requirements.[41] Some revisions to the U.S. act were made in 1831 and 1870, but the first comprehensive codification of U.S. copyright law was the 1909 act, which still included registration and notice formalities.[42]

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[36] Leaffer, *supra* note 25, at 2-3.
[37] Goldstein, *supra* note 6, at 27.
[38] Goldstein, *supra* note 6, at 3-4.
[39] Goldstein, *supra* note 6, at 171.
[40] U.S. Const., Art. I, Sec. 8, Cl. 8.

In drafting its early copyright law, Canada borrowed from the United Kingdom and the United States, but with one "provincial" eye on France. In 1814, the U.K.'s Statute of Anne was extended to the British dominions, but it required first publication and registration in the United Kingdom. In 1832, the Lower Canada province (despite its heritage of French civil law) adopted a copyright law modeled on the U.S. 1831 copyright revision. In 1867, the British North America Act gave the federal Canadian Parliament power to pass copyright legislation, which it did in 1868, following the Canadian provincial language. In 1887, the United Kingdom became one of the first members of the (international) Berne Copyright Convention, bringing Canada and other U.K. dominions into Berne. There have been several major revisions to the Berne Convention (at Berlin in 1908, Rome in 1928, Paris in 1971). Sometimes Canada has adjusted its law to adhere to the new Berne provisions, other times not immediately. Canada adopted a new copyright statute in 1921, which largely copied the U.K. Act of 1911, ended Canadian reliance on U.S. statutory precedent, and allowed Canada to adhere to the 1908 revision to Berne. Through 1931 amendments, Canada adhered to the 1928 Rome revision of Berne.[43]

Part of Canada's willingness to follow a more French path with its copyright law has come from pressure and encouragement from Quebec. Also, Quebec's civil code (influenced by Quebec's French heritage) discusses protection of privacy interests akin to the "appropriation" tort in the United States. This has led some scholars to speculate that the Quebec civil code could be used to protect some quasi-copyright interests. The language of the code demonstrates some sympathy toward the French attitudes about copyrights generally.[44]

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[41] Stephen J. Strauss, *Don't be Burned by Berne: A Guide to the Changes in the Copyright Laws as a Result of the Berne Convention Implementation Act of 1988,* 71 J. PAT. [& TRADEMARK] OFF. SOC'Y 374, 375 (1989).

[42] Leaffer, *supra* note 25, at 4-5.

[43] W.L. Hayhurst, *Intellectual Property Laws in Canada: The British Tradition, the American Influence and the French Factor,* 10 INTELL. PROP. J. 265, 281-287 (1996).

Reform in Canada in late 1980s and early 1990s, and moral rights

Recently, Canadian copyright has required some changes to satisfy concerns expressed during recent trade negotiations, including NAFTA, and to keep up with changing technology. "Canada's [1921] *Copyright Act* has existed for more than 60 years. It is imperative that we revise this antiquated copyright law. ... When the Act was drafted, computers, photocopiers, satellites, cable television and video cassette recorders were unknown."[45] In the discussion of these reforms, Canadian legislators expressed goals echoing the French emphasis on the rights of the author. "[T]he revision process must not only cope with the problems caused by developments since 1924; a new law must also keep an eye to the quickening pace of the use and exploitation of intellectual property ... . The constantly changing technology has drastically altered the relationship between creators and the users of their works in today's society."[46]

Formal discussions in Canada about the need to revise the copyright act began in the 1950s. A Canadian commission report in 1957 was heavily influenced by the United Kingdom's 1956 revisions to its own copyright act; France also revised its copyright act, in 1957. However, the Canadian Parliament took no action on this 1957 report. Nor did it directly act on a 1971 report by the Economic Council of Canada, which focused on consumers' interests and was criticized by two members for not being more pro-creator. After this 1971 report, the Minister of Consumer and Corporate Affairs formed a study group, which issued a 1977 report that was "unabashedly pro-creator." [47] Between 1980 and 1983, the Department of Consumer and Corporate Affairs published 14 studies on selected copyright issues.[48] Building on the three decades of research, the Department of Consumer and Corporate Affairs and the Department of Communications in 1984 issued a "white paper" on proposed copyright revisions.[49] However, following a change in government, the 1984 Canadian White Paper "was referred to as a document which did not necessarily embody government policy."[50]

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[44] *Id.* at 309-315.

[45] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at xi

[46] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at xi.

[47] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 2-3.

In its 1985 report, the Sub-Committee on the Revision of Copyright,[51] noted that it "found favour" with the "general thrust" of the 1984 White Paper.[52] However, clearly on some issues (such as "fair use"/ "fair dealing," which will be discussed below) the 1985 sub-committee report was far more "pro-creator" than the 1984 White Paper. The 1985 sub-committee report outlined its six overriding objectives:

1. Give more emphasis and reward to creative activity;
2. Clarify and extend moral rights;
3. Make the application of copyright principles as general as possible;
4. Avoid improper extensions of copyright protection;
5. Recognize the major importance of cultural enterprises.[53]

"[W]hat Canada does in the revision of copyright will show how much value it attaches to the contribution of creators to the national life."[54]

The 1985 sub-committee saw revision of the Copyright Act as "an occasion to make a statement of our pride in the achievement of Canadian authors and performers and in the coming of age of this country as a place where cultural pursuits and creative activity are fully recognized."[55] The sub-committee recommended more than a symbolic statement; "such symbols have meaning only if they are reflected in the income-earning potential of individual authors, composers, performers, and the many other creative individuals working in Canada."[56] "Creation is not, generally speaking, sufficiently economically rewarding .... Given the large number of individuals who are actively involved in creative activity, there will be few who can make a living out of it and fewer still who can derive a large income. Copyright cannot remedy this situation but it can help."[57] "[B]ecause of the special contributions creators make to Canadian society, they must be fairly rewarded for the constantly increasing number and variety of uses of their work."[58]

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[48] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 3.

[49] Judy Erola & Francis Fox, FROM GUTENBERG TO TELIDON: A WHITE PAPER ON COPYRIGHT: PROPOSALS FOR THE REVISION OF THE CANADIAN COPYRIGHT ACT (1984) (hereinafter 1984 CANADIAN WHITE PAPER)

[50] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 3.

[51] Standing Committee on Communications and Culture, Canada House of Commons. This self-described "all-party" subcommittee was composed of five Members of Parliament: three Progressive Conservatives, one Liberal, and one New Democrat. The subcommittee spent 10 months examining copyright revision, received more than 300 written briefs, and heard from 111 witnesses at public hearings. Its report made 137 recommendations, many, although not all, of which were included in the 1985 amendments to Canada's Copyright Act. The report also included a brief, three-page dissenting opinion disagreeing with some of the recommendations. While this report does not portray the entirety of Canadian legislative history and thought on the recent Canadian Copyright Act amendments, it does provide a partial summary of some of the Parliament members' concerns.

[52] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 3.

[53] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 4.

[54] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 4.

The subcommittee report quoted a Nov. 8, 1984 statement issued by Minister of Finance Michael H. Wilson, who noted that Canada's *Copyright Act* "has been overtaken by new technologies. This has created ambiguities and uncertainties and has, in some cases, left Canadian copyright owners with less protection or compensation than would be available to them in other countries which have more modern copyright laws."[59] Wilson called this "a real obstacle to economic growth, particularly in an economy which is increasingly service-oriented, with a growing role for the creation, transmission and processing of information, and in which automation may be a powerful source of productivity gains."[60]

When the act was significantly modified in 1988, the extent of Canadian moral rights was clarified.[61] Canada also passed copyright amendments in 1993, largely provisions needed by Canada to meet the terms of NAFTA.[62]

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[55] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 4.
[56] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 4
[57] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 5.
[58] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at xii.
[59] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 1, citing *A New Direction for Canada: An Agenda for Economic Renewal*, Canada, Department of Finance, 1984, 56.
[60] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 1, citing *A New Direction for Canada: An Agenda for Economic Renewal*, Canada, Department of Finance, 1984, 56.
[61] Normand Tamaro, THE 1995 ANNOTATED COPYRIGHT ACT 11 (1994) (Translated by Christopher McGuire).

The moral rights available under Canadian law today are far more favorable to creators than the limited moral rights under U.S. law. (The text of Canadian moral rights provisions are excerpted in Appendix A.) Canadian law protects the moral rights of any type of creator. The "right of integrity" protects the honor or reputation of the author when his work has been distorted, mutilated or modified or when the work has been used in association with a product, service, cause or institution. Canadian creators also have the right to have their names associated with their work or to remain anonymous, if desired. In Canada, the duration period for moral rights is identical with the duration period for the creator's other, economic rights in the work. Unlike economic rights, Canadian authors cannot assign their moral right to someone else.[63]

Reform in the United States — the 1976 act, the Berne Convention Implementation Act of 1988, and moral rights

Similar concerns about technological advances and international copyright inequities also spurred the United States to update its copyright act. Essentially, the United States in these two acts made it easier for "authors" to secure and protect copyrights. The United States eased restrictions that had required that detailed formalities (of notice, registration and deposit) be met before someone had copyright protection. It was the United States' earlier refusal to reject such formalities that kept it out of the Berne Convention. Pressure for the United States to adhere to the Berne Convention developed again when the 1909 Copyright Act was revised in 1976. The 1976 revisions loosened the notice requirement and set the duration term for copyrights at the Berne minimum of the author's life plus fifty years. Yet, the United States still did not meet the Berne conditions. The failure of the United States to join Berne, according to Goldstein, turned the United States into a

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[62] Tamaro, *supra* note 56, at 11. See also Ysolde Gendreau, *Recent Developments in Canadian Copyright Law*, 41 J. COPYRIGHT SOC'Y OF THE USA 183, 187 (1993)

[63] [Canadian] Copyright Act, R.S.C. 1985, c. C-42, sections 14.1(1) and 28.2(1).

"copyright outcast" and undermined efforts to negotiate trade agreements protecting U.S. intellectual property in other countries.[64]

Enactment of the [U.S.] Berne Convention Implementation Act of 1988, [65](which took effect March 1, 1989,) enabled the United States to adhere to the Berne Convention of 1886, as revised. [66] To adhere to the Berne Convention, a nation's domestic law must provide "Berne Convention works" with at least the minimum protections required by the Berne Convention.[67] To join the convention, the United States generally had to "minimize formalities and amplify protection."[68] To adhere to the convention and qualify for Berne Convention protection, a nation's domestic law must meet two essential conditions: 1. reciprocal national treatment — Berne Union nation members must extend whatever copyrights their domestic laws grant to their citizens to the citizens of other Berne Union nations, as well as the rights "specially granted" by the convention. 2. Enjoyment and the exercise of these rights could not be subject to any formal requirements.[69] It was primarily this second condition that had prevented the United States from participating in Berne.[70]

Participation by the United States in the Berne Convention was further complicated by an obligation added in the 1928 Rome revision to the Berne Convention — Article 6bis, moral rights: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[71] At first, U.S.

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[64] Goldstein, *supra* note 6, at 186.
[65] Pub. L. No. 100-568, 102 Stat. 2853
[66] "The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 8, 1886" has been reworked or revised several times: in Paris in 1896; in Berlin in 1908; in Berne in 1914; in Rome in 1928; in Brussles in 1948; in Stockholm in 1967; and in Paris in 1971. The Paris Convention of 1971, as amended on Oct. 2, 1979, is the latest version. Harry G. Henn, 1989 SUPPLEMENT TO COPYRIGHT LAW: A PRACTITIONER'S GUIDE: SUMMARY OF THE BERNE CONVENTION IMPLEMENTATION ACT OF 1988, 1 (Practising Law Institute, March 1989).
[67] Henn, *supra* note 66, at 1.
[68] Henn, *supra* note 66, at 1.
[69] Henn, *supra* note 66, at 4 and Strauss, *supra* note 41, at 375.
[70] Strauss, *supra* note 41, at 375.
[71] Strauss, *supra* note 41, at 376 (quoting an English translation of Article 6bis of the Berne Convention).

publishers and movie producers were so strongly opposed to any moral rights clause that United States ratification of the Berne Convention seemed impossible.[72]

However, in the Berne Convention Implementation Act of 1988, Congress made some major changes to the Copyright Act of 1976, enough to satisfy the Berne requirements. Under the 1976 Act, a work received copyright protection only if it had a visually perceptible and legally sufficient copyright notice (such as Copyright John Q. Doe 1977). The 1988 act eliminated this mandatory notice requirement for works published after March 1, 1989.[73] Also, the 1976 act required that works be registered with the U.S. Copyright Office before the work's author could file a copyright infringement action. Under the 1988 act, mandatory registration is still required for works of American origin, but not for foreign works from other Berne Union nations. [74]A few other less important formalities also were revised to satisfy Berne.

Congress still was hesitant to add moral rights to U.S. copyrights when it explored ways to adhere to and implement the Berne Convention.[75] Congress questioned whether it needed to enact new laws protecting moral rights. Were existing laws, federal and state, statutory and common law, enough to satisfy requirements of the Berne Convention? Congress ultimately concluded that new moral rights laws were not necessary and passed the Berne Convention Implementation Act of 1988. But debate on this point continues, and even attorneys who write about international copyright issues disagree. In 1989, Harry G. Henn wrote that the 1988 act "may not adequately recognize every right 'specially granted' by the Convention (e.g., noneconomic, or moral, rights)." [76] In the same year, however, Stephen J. Strauss opined that, "International legal scholars as well as the States and Commerce Departments now agree that present United States laws under the Copyright and Lanham [Trademark] Acts, as well as the various State statutes and common law principles such as libel, defamation, misrepresentation and unfair competition, are sufficient to satisfy the moral rights requirement of the Berne Convention."[77] For example, California, New York and Massachusetts have statutes granting some artists some rights similar to moral rights.

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[72] Strauss, *supra* note 41, at 376.
[73] Strauss, *supra* note 41, at 379.
[74] Strauss, *supra* note 41, at 380.
[75] Strauss, *supra* note 41, at 383.
[76] Henn, *supra* note 66, at 4.

More recently, Congress in the Visual Artists Rights Act of 1990 has created some limited moral rights, but only for "works of visual art," including "paintings, drawings, prints, sculptures and still photographic images produced for exhibition purposes only, and existing in single copies or in limited editions of 200 or fewer copies." These limited rights are now included in section 106A of the U.S. copyright act. (The text of section 106A is set forth in Appendix C.) These rights seem stingy compared to the "right of integrity" and "right of association" Canada gives to all its creators of works. Clearly, the U.S. Congress does not agree with the value Canada's sub-committee placed on moral rights: "[M]oral rights should have as much importance as economic rights. ... Creative works are very much the expression of the personality of their authors. There is an identification between authors and their works. ... [C]reators cannot be fully protected unless their moral rights are recognized and enhanced."[78]

Fair use or fair dealing

More indicative of the values of the U.S. Congress is the American approach of "fair use," a statutory defense to actions that would otherwise be an infringement of the creator's copyrights. Goldstein sees the "fair use" doctrine as the key symbol of the United States' economic-centered concept of copyright. "Just as moral right is the preeminent symbol of the author's rights culture, fair use ... symbolizes the more pragmatic American culture. Fair use is a hard-edged economic instrument that will excuse an unauthorized use of a copyrighted work as being a fair one any time it is too costly for the parties to negotiate a license."[79] Courts applying the Section 107 "fair use" doctrine examine four factors of an infringing use: what was the purpose and character of the use, what was the nature of the copyrighted material that was used, how much and of what significance was the copyrighted material used, and what was the effect of the use on the potential market value of the copyrighted work. Goldstein sees the "fair use" doctrine as economically driven and inherently pragmatic. "Fair use operates on the pragmatic notion that half a loaf is better than none: without it, the copyright owner would get no revenues because the costs of negotiating a license are insuperably high, while the prospective user would for the same reason get no copy; with it, the copyright owner still gets nothing, but the user at least gets to make a copy."[80]

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[77] Strauss, *supra* note 41, at 377-378.

[78] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 6.

The 1984 Canadian White Paper had proposed that the Canadian copyright infringement defense called "fair dealing" be changed in name and content to a "fair use" defense very similar to the U.S. "fair use" defense.[81] The 1985 sub-committee, however, strongly criticized such a change. "The fair dealing provision already constitutes an important limitation to copyright by providing that some unauthorized use of intellectual property is permissible as long as it is 'fair' and it is done for the purpose of 'private study, research, criticism, review or newspaper summary.' Substituting a fair use criterion would expand this defense to permit any use whatsoever as long as it did not inflict economic damage on the copyright owner."[82] "[F]air use implies that rights in intellectual property are definitely second class rights, very different from rights in physical property. The Sub-Committee rejects this proposition and takes the opportunity to assert that 'ownership is ownership is ownership.' The copyright owner owns the intellectual works in the same sense as a landowner owns land. ... [T]hose differences that do exist are adequately reflected in the fair dealing concept."[83] Instead, the sub-committee recommended against any liability exception, without a strong public purpose. "A strong public purpose must justify any exception from copyright liability; a desire to save money or time is not such a strong public purpose. Quite the contrary: the stronger the purpose, the greater should be the willingness to spend money towards its realization."[84]

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[79] Goldstein, *supra* note 6, at 170.

[80] Goldstein, *supra* note 6, at 170

[81] . 1984 CANADIAN WHITE PAPER, *supra* note x, at 39-40.

[82] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 9.

[83] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 9.

The text of Canada's current "fair dealing" provision and related sections are set forth in Appendix B. The text of the U.S. "fair use" provision is included in Appendix C. The Canadian "fair dealing" defense provisions are very detailed and limited in who can claim the defense and when. The significantly less detailed U.S. "fair use" provision outlines a broad defense that may be claimed by a broad range of copyright defendants.

Conclusion

The Canadian and U.S. acts have many similarities and operate in a very similar fashion. It would be hard to be good neighbors and trading partners without copyright acts that worked well together. But in subtle ways, the two nations do portray the international duality of copyright goals and objectives. How much difference will these different goals make in the future? Perhaps little, at least according to Goldstein. "[P]utting the emblems of moral right and fair use to the side, the two cultures of copyright have much in common. The similarities lie not only in the practicalities of the marketplace but in the laws' underlying premises."[85] Goldstein suggests that the differences may be largely rhetorical — but nurtured by notions of national cultural identity and symbols with great political power.[86]

As a major exporter of intellectual property, will the United States — for economic and political instead of theoretical reasons — decide that it must follow the international flow of expanded copyrights? On one hand, congressional activity in the past few decades has followed this trend of expanded rights. On the other hand, several U.S. Supreme Court decisions involving the "fair use" doctrine[87] to some extent have limited such expansions.

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[84] 1985 CANADIAN SUB-COMMITTEE REPORT, *supra* note 7, at 9.

[85] Goldstein, *supra* note 6, at 170

[86] Goldstein, *supra* note 6, at 179.

Some U.S. legal scholars advocate that the United States should join with Canada and embrace a broader vision of "moral rights."[88] Some Canadian lawyers suggest that Canada should amend its "fair dealing" provision become more similar to the U.S. "fair use" doctrine.[89] Perhaps the romantic mental image of the struggling artist has pulled too many nations to join in a "moral rights" march that really may not serve creativity.[90] Or perhaps "moral rights" supporters — lost in their own rhetoric of "natural rights" and the criticism of the "utilitarian" U.S. approach —have not articulated their own objectives. It is not the purpose of this paper to advocate for either side or either course of action. Instead, this paper's goal has been to enlighten its readers about the cultural-based distinctions between Canadian and U.S. copyright laws. Whether this debate is "real" or "rhetorical," it has a real potential of hindering shared creative development along the U.S./Canadian border.

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[87] Notably *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) (where the U.S. Supreme Court held that rap group 2 Live Crew's parody of Roy Orbison's song, "Oh, Pretty Woman," was a "fair use") and *Sony Corp. of America v. Universal City Studios* (the *Betamax* case), 464 U.S. 417 (1984) (where the U.S. Supreme Court held that private non-commercial taping of television programming for the purpose of time-shifting was a "fair use.")

[88] Jonathan Stuart Pink, *Moral Rights: A Copyright Conflict Between the United States and Canada,* 1 Sw. J. of L. & Trade Am. 171 (1994).

[89] *ARTICLE: Constitutionalizing Copyright: Freedom of Expression and the Limits of Copyright in Canado*, 55 U.T. Fac. L. Rev. 175 (1997).

[90] For arguments against expansion of U.S. "moral rights," see Leaffer, *supra* note 25, at 281, and Robert A. Gorman, *Federal Moral Rights Legislation: The Need for Caution*, 14 Nova L. Rev. 421 (1990). For arguments that the current U.S. "moral rights" provision can successfully coexist with the U.S. "fair use" provision, see Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, and Fair Use,* 14 Cardozo Arts & Ent. L.J. 79 (1996). For an argument that the two provisions cannot coexist, see *NOTE: The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution,* 24 Hofstra L. Rev. 1127 (1996).

Appendix A

Excerpts from [Canadian] Copyright Act, R.S.C. 1985, c. C-42

Section 14.1(1): "Moral Rights"

14.1(1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

14.1(2) Moral rights may not be assigned but may be waived in whole or in part.

14.1(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

14.1(4) Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

14.2(1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

14.2(2) The moral rights in respect of a work pass, on the death of its author, to
(a) the person to whom those rights are specifically bequested;
(b) where there is no specific bequest of those moral rights and the author dies testate in respect of the copyright in the work, the person to whom that copyright is bequeathed; or
(c) where there is no person described in paragraph *(a)* or *(b)*, the person entitled to any other property in respect of which the author dies intestate.

Section 28.2(1): "Nature of right of integrity"

28.2(1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,
(a) distorted, mutilated or otherwise modified; or
(b) used in association with a product, service, cause or institution.

28.2(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

28.2(3) For the purposes of this section,
(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work , or
(b) steps taken in good faith to restore or preserve the work
shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

Appendix B

Excerpts from [Canadian] Copyright Act, R.S.C. 1985, c. C-42

Section 27(2): "Acts not constituting infringement of copyright"
27(2) The following acts do not constitute an infringement of copyright:

27(2)(*a*) and 27(2)(*a.1*) : "Any fair dealing with any work for certain purposes"

(a) any fair dealing with any work for the purpose of private study or research

(a..1) any fair dealing with any work for the purposes of criticism, review or newspaper summary, if
(i) the source, and
(ii) the author's name, if given in the source,
are mentioned

...

27(2)(*c*): "If the work is permanently situated in a public place"
(c) the making or publishing of paintings, drawings, engravings or photographs of a work of sculpture or artistic craftsmanship, if permanently situated in a public place or building, or the making or publishing of paintings, drawings, engravings or photographs that are not in the nature of architectural drawings or plans, of any architectural work;

27(2)(*d*) : "Short passages intended for schools"
(d) the publication in a collection, mainly composed of noncopyright matter, intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works not themselves published for the use of schools in which copyright subsists, if not more than two of the passages from works by the same author are published by the same publisher within five years and the source from which the passages are taken is acknowledged;

27(2)(*e*) : "Publication in a newspaper of a report of a lecture delivered in public"
(*e*) the publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except while the building is being used for public worship, in a position near the lecturer, but nothing in this paragraph affects the provisions in paragraph (*a*), as to newspaper summaries;

27(2)(*f*): "Recitation of any reasonable extract"
(*f*) the reading or recitation in public by one person of any reasonable extract from any published work;

...

28: "Report in newspaper of political speech no infringment"
28. Notwithstanding anything in this Act, it shall not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper.

Appendix C

Excerpts from U.S. Copyright Act of 1976, as amended, 17 U.S.C. §§ 101-810.

Section 107: "Limitations on exclusive rights: Fair Use"

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all of the above factors.

Sec. 106A: "Rights of certain authors to attribution and integrity," Edited

(a) Rights of Attribution and Integrity. ... the author of a work of visual art —
  (1) shall have the right —
    (A) to claim authorship of that work, and
    (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create

(2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and

(3) subject to the limitations set forth in section 113(d), shall have the right-
(A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
(B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that work is a violation of that right.

[Subparts b, c, d and e omitted]

INCITEMENT: HIT MEN, HIT LISTS AND HIT MOVIES

A Paper Presented to
the Law Division

AEJMC

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Abstract

Recently, a jury awarded $107 million dollars in damages to abortion providers who claimed the posters and Web site of anti-abortion activists constituted a threat. The award seems unlikely to withstand a Constitutional challenge under the narrow incitement test set forth in Brandenburg v. Ohio. However, recent decisions concerning potential liability for "aiding and abetting" violence may signal a change in the court's willingness to hold speakers accountable for speech that provokes violence.

Incitement: Hit Men, Hit Lists, and Hit Movies

Political speech in America has often been rough and personal. Recent debate over impeachment of the President, given the context from which charges against him arose, was intensely personal--with public disclosures about not only the sex life of the President, but those of key Congressional opponents and attacks on the integrity and motives of the independent counsel and others. While the impeachment debate may have seemed particularly strident, personal attacks in American politics are nothing new.

George Washington, though a heroic figure revered by many, was hardly immune from virulent criticism, and the election of Thomas Jefferson was heralded by at least one newspaper with dire predictions that "the soil [would] be soaked with blood" and that "murder, robbery, rape, adultery and incest [would] openly be taught and practiced" in America.[1] Abraham Lincoln touched emotions deeply enough that his election ignited long-festering divisions between North and South into open war.

At the foundation of American political discourse is the Declaration of Independence--an eloquent call to arms that is largely a personal attack on George III. The document lists more than two dozen in the "long train of abuses"[2] attributed to the king--who is depicted as having "sent hither swarms of Officers to harass our people and eat out their substance."[3] The tyrant described and denounced in the Declaration is hardly better than a beast, and he personally is held to blame for the suffering of the colonists and their justifiably bloody break with British rule.

In another age, the elegant Declaration would be shortened still further by the Cuban "exilios" of Miami to bumper sticker brevity: "No Castro, no problem." The intent and effect of the Declaration and the four-word slogan are not so much different--politics (and persecution) are personal--and grievances are given life and focus by identification with a flesh and blood enemy. It is something of the same convenient hyperbole invoked by statesmen seeking a simple explanation of the complicated decision to bomb a foreign capital by the powerful equation of that nation's leader with Hitler: the characterization eliminates the need for details. The debate is over, and the cause presumed just.

Fair or not, the tradition of personal attack runs deep in American political persuasion. If the First Amendment is to protect vigorous political debate, it thus must protect even vigorous criticism of individuals. Protection of vilification is not without cost. While most of the population no doubt understands the difference between intense verbal attacks on individuals and a literal call for physical harm to those same individuals, at least some of the population may be willing to take what seems to them the next logical step from character assassination to literal assassination. There is no way to insure that a President characterized as immoral or criminal can be kept completely safe from a physical attack by an extremist who, driven by religious or other convictions, believes that violence is justified or required if the system fails to bring a miscreant to justice. However, few would argue that the appropriate remedy is to limit or ban debate over the important issue of a President's integrity, or verbal attacks on that integrity--even at the serious risk that such criticism might precipitate a physical attack. It is a price that American society has been willing to pay for the freedom to criticize and to personalize political differences.

Brandenburg v. Ohio

It is with the understanding that political debate can be rough and can create the potential for violence that the courts have fashioned a narrow exemption to First Amendment protection of speech. Such protection is denied to speech that amounts to incitement. It is instructive to look back at the case in which current standards for finding incitement (and thus limiting First Amendment protection) were articulated: the 1969 Supreme Court decision in Brandenburg v. Ohio.[4]

Lest anyone assume that the Court in deciding Brandenburg inhabited a peaceful and orderly world free from the violence and terrorism that many would say infest our own, it is important to remember the nature of the times. The sixties were a violent era, the civil rights debate marred by bombings, murders and brutality. The Court knew all too well that a climate of violence hung over the political debate. The evils against which the state of Ohio sought to invoke its criminal syndicalism law were real, not hypothetical. And Clarence Brandenburg, if one can judge from the information provided in the Court's decision, was not a pleasant man.

From the facts set out in the Supreme Court's opinion, Brandenburg appears to have been a marginal character in the civil rights drama, whose major mistake--and only claim to fame--was making the network news. Brandenburg was identified at trial as the caller who had tipped a Cincinnati television station off to a Ku Klux Klan rally to be held on a farm in Hamilton County, Ohio and invited an announcer-reporter at the station to attend. The reporter did attend, taking along a cameraman. They filmed the rally, and portions of the film were broadcast on the Cincinnati station and later on network television. It appeared from the news film that, except for a dozen or so Klansmen, no one but the television reporter and cameraman bothered to show up to listen to what Brandenburg had to say.

The film showed twelve hooded figures, some carrying guns, gathered around a large wooden cross, which they burned. According to the Court, most of what was said at the rally was "incomprehensible when the film was projected."[5] However, enough was understandable from scattered phrases to know that what was said was "derogatory of Negroes and, in one instance, of Jews."[6]

One scene from the film did capture Brandenburg, in Klan regalia, making the following speech:

> This is an organizers' meeting. We have had quite a few members here today which are--we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.[7]

A second film showed Brandenburg repeating a similar speech to an even smaller group of hooded figures. In the second speech, Brandenburg didn't talk about "revengeance." However, he did opine, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." While some of the other hooded figures in the film carried weapons, Brandenburg had only words.[8]

Ohio's Criminal Syndicalism law made it a crime to "[advocate] the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform" or to "voluntarily [associate] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[9] Brandenburg was found guilty of both, fined $1,000 and sentenced to one to ten years in prison. He challenged the Ohio law as a violation of his First and Fourteenth Amendment rights.

The Supreme Court noted that criminal syndicalism laws like that in Ohio had been passed by many states and that the Court had upheld the constitutionality of a similar California law some years earlier in Whitney v. California.[10] However, the Court further noted that Whitney had been "thoroughly discredited by later decisions."[11] In ruling the Ohio statute unconstitutional, the Supreme Court expressly overruled Whitney.[12]

According to the Court, the constitutional principle of free speech fashioned in cases decided subsequent to Whitney held that government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[13] Simply teaching that violence was appropriate or even morally necessary could not be equated with incitement. A failure by the Ohio statute to distinguish between advocacy and incitement to imminent lawless action was fatal to its constitutionality.

The Supreme Court in Brandenburg appears to have arrived at the end of a journey that began with decisions upholding World War I era convictions of war protestors under federal sedition laws.[14] In his concurrence in Brandenburg, Justice Douglas traced that progression--in which Justice Holmes over time had had second thoughts about whether and under what circumstances the state could criminalize speech critical of the government. According to the concurring opinions in Brandenburg of Justices Douglas and Black, both of whom agreed with the majority that Brandenburg's conviction had violated his Constitutional rights, the "clear and present danger" doctrine enunciated by Holmes in 1918 in Schenck v. United States,[15] "should have no place in the interpretation of the First Amendment."[16] Justice Douglas noted that, despite Justice Holmes's articulation of the clear and present danger test in 1918, and his adherence to it in two similar cases decided in that term, by 1919 both Justice Holmes and Justice Brandeis joined in dissenting from the majority opinions affirming the convictions of other World War I dissidents in three cases decided that term. Even if the "clear and present danger" test might be sustained in time of war--a proposition Justice Douglas was not at all ready to admit--its application in time of peace seemed to him completely unacceptable as a justification for governmental intrusions restricting First Amendment rights.

By the time the Supreme Court decided Whitney v. California in 1927--upholding a state statute criminalizing speech and assembly that advocated force as a means to political change--Justices Brandeis and Holmes concurred, but not without expressing serious reservations about the Court's lack of a "fixed standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as a means of protection."[17] Justice Brandeis reminded his colleagues, in an eloquent concurrence that has outlasted the majority ruling, of the founders' belief in liberty as an end in itself, not just as a means to an end.[18] Government exists not simply to serve the common welfare, but to "make men free to develop their faculties."[19] Reminding his brethren that "[m]en feared witches and burned women," Justice Brandeis contended:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. . . To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. . . .The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind."[20]

By the time the Supreme Court arrived at Brandenburg more than forty years later, it was clear that the need for distinguishing between advocacy and incitement was firmly established. The Court was unwilling to allow the state to suppress speech unless the likelihood of imminent violence was established. While the majority was unwilling to go so far as Justice Douglas, the result in Brandenburg was clearly in line with his concurrence: "The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts."[21] Recognizing that in prior cases dissent alone had been punished, the Court seemed to agree with Douglas that threats like those Brandenburg voiced, speaking mostly to the camera and a handful of the faithful, were "often loud but always puny and made serious only by judges so wedded to the status quo that critical analysis made them nervous."[22] Had Brandenburg not alerted a television reporter to his rally, it seems doubtful that anyone would even have known about his words, let alone have had grounds to fear them. Moreover, words fearful only in the abstract are fully protected; it is only "speech . . brigaded with action"[23] that may be regulated or prosecuted despite the First Amendment.

Incitement and Mass Media

Speech about violence, even advocacy of violence, under Brandenburg is protected unless it amounts to incitement. Decisions since Brandenburg have reinforced this principle: "only speech which intentionally provokes immediate violence is unprotected."[24] This is particularly the case with representations of violence and speech about violence on mass media, which are rarely if ever disseminated with any actual intent of causing imminent violence[25] or any realistic prospect of causing immediate retaliation, as a provocative face-to-face exchange might.[26] With few exceptions, courts have been unwilling to allow juries to consider claims against media defendants for damage inflicted by others allegedly inspired to act by media content. That has been true whether the damage was inflicted by a media-inspired individual on other victims[27] or only on himself.[28]

The Nuremberg Files

In the spring of 1999, a jury in Portland, Oregon handed down a verdict with the potential for profound impact on First Amendment protection of speech that might lead to violence. In a civil suit in federal district court, plaintiffs including the Oregon chapter of Planned Parenthood and abortion clinics and providers won damages of $107 million dollars for what the jury found was threatening speech on a Web site and in posters circulated by anti-abortion activists. Several of the defendants had said that violence was justifiable to prevent abortion, but none was accused of directly threatening any of the plaintiffs.[29] Nevertheless, the jury saw fit to award about a million dollars in compensatory damages and over $106 million in punitive--a reflection of the jury's outrage at the defendants' particular mode of expression and content.

The suit was brought under a 1994 federal statute that allows civil suits for damages caused by threats of force against abortion providers. According to the plaintiffs, the defendants, including two anti-abortion organizations and twelve individual activists, had created a "hit list" that allowed and encouraged violent extremists to target abortion providers. Posters prepared and distributed by some of the defendants listed a "deadly dozen" doctors who provided abortions. One poster singled out a particular obstetrician. These "wanted posters" had been handed out at rallies and in the doctors' neighborhoods, offering cash rewards for information about abortion providers.

The Web site, "The Nuremberg Files," listed the names and addresses of more than 200 doctors. Its purpose was to solicit personal information about the doctors, said its creators, so that the doctors could be brought to justice if abortion were ever banned. The doctors were accused of committing "crimes against humanity." Readers were invited to send in doctors' license plate numbers and the names of their children. Particularly disturbing to the plaintiffs and the jury was the fact that after the fatal shootings of several doctors listed in the Nuremberg Files, their names had been crossed out, almost like items on a grocery list.[30]

At the trial, abortion providers testified as to their fears of violence. One Portland physician testified that she had lived in terror since 1995 when her name appeared on a poster as one the "deadly dozen."[31] Other doctors testified about using disguises, bodyguards and bullet proof vests and teaching their children to "crouch in the bathroom if they heard gunfire."[32]

The defendants argued that they were simply political protestors collecting data in the hope that one day doctors providing abortions could be put on trial in the style of Nazi war criminals after World War II.[33] They argued that neither the Web site nor the posters contained explicit threats. In fact, the creator of the Web site, a Georgia computer programmer, was not named as a defendant. He claimed in his testimony as a witness that he alone--and not any of the defendants--had control over the site. "This is between me and God. . . I don't even know these people."[34]

Did naming names of abortion providers constitute a threat? The history of American political debate and the express language of the materials would argue against such a conclusion. It would seem hard to understand how a jury, applying the requirements of Brandenburg that speech must incite imminent violence, could have come to the conclusion they reached. However, the judge's instructions were that the posters and Web site should be considered threats if they could be taken as such by a reasonable person considering the context of nationwide violence against clinics and abortion doctors.[35] That seems a much different standard which, had it been applied to a Klansman in the context of the 1960s civil rights struggle, might have resulted in a much different outcome in Brandenburg. Surely it would seem likely, if Brandenburg still controls, that the Supreme Court would not uphold the Nuremberg Files verdict and award.

It is important to remember that none of the defendants was accused of a physical attack against any of the plaintiffs, even though there had been a history of attacks on clinics and doctors. The defendants were being sued solely on the basis of speech about a political issue. Admittedly that speech was specific, personal and rough. It identified the doctors as the personification of the problem. If no names had been mentioned, it is hard to see how any threat could have been found. Does the fact that names are mentioned in the context of political speech alter its basic character, given the history in America of rough and critical personal attacks as a tactic in political debate? It is hard to see how.

If the courts on appeal apply the Brandenburg standard to the Nuremberg verdict, one might expect the verdict to be overturned. However, several recent actions by the United States Supreme Court in cases involving claims of third-party liability based on provocative speech need to be considered. Do they signal a shift in the willingness of the courts to shelter controversial speakers from plaintiffs impatient with violent media content and its alleged real-life impact? Might the Supreme Court carve a new "public interest" exception to the First Amendment for verbal attacks, even in the context of political speech, that could provoke physical attacks? Or will the high court stand firm in its insistence on a tight fit between expression and action before even a speaker who advocates violence loses his right to speak?

Hit Man

In 1993, Lawrence Horn, who stood to inherit a multi-million dollar injury settlement if his son died, hired a hit man, James Perry, to kill his former wife, the boy and his nurse. Perry, about a year before the murders, had bought himself a how-to book distributed by a Colorado publisher, Paladin Enterprises. Its title? Hit Man: A Technical Manual for Independent Contractors. The 130-page book provided detailed instructions on how to commit a murder and get away with it. Perry, however, appeared not to have read the part about not checking into a hotel near the murder scene using one's real name and address. He was arrested when police placed him in the town where the murders were committed because of his registration at a motel near the murder scene on the day of the crime. After his arrest, police found Hit Man in his apartment. The estates of the murder victims subsequently sued Paladin and its owner, Peter Lund, for the wrongful deaths for which they claimed the book was responsible.[36]

Had the Brandenburg standard been applied, it seems clear the case against the publisher would have been dismissed. The book, while a detailed set of instructions on how to commit a murder, was not an incitement to commit the murders in question. And Perry had the book long before he committed the murders, so there appears to have been no imminent action resulting from his having read the manual. Instead, the Fourth Circuit Court of Appeals found that the publisher could be held liable for wrongful death if the facts at trial showed that the publisher had, by making the book available, "aided and abetted" in the murder. As in an earlier case in which a lower court had allowed a wrongful death action against a publication that had printed the classified ad of a hit man offering his services for hire,[37] the United States Supreme Court declined to hear an appeal of the decision. According to critics, the Supreme Court's willingness to let these decisions stand "cracks the door for nuisance lawsuits that threaten moviemakers and publishers."[38] There is some evidence of that. Recently, the Supreme Court let proceed a lawsuit seeking to hold Time Warner and actress Sharon Stone liable for a shooting plaintiffs claimed occurred because a couple saw Natural Born Killers.[39] It is hard to see how precedent could support such a result.

How might these cases affect a future Supreme Court decision if it hears an appeal of the verdict in the Nuremberg Files? There are, of course, some distinctions. While the abortion debate falls squarely within the definition of political speech, it might be argued that a how-to manual for hired killers does not. However, language from Hit Man quoted by the appellate court suggests otherwise.

Analysts of the Paladin case point to what they consider a blunder by the publisher, which stipulated in a motion for summary judgment that it intended for criminals to use its book to plot murders for hire and that the book helped hired killer James Perry to commit murder.[40] Perhaps it was a carelessly provocative move on the part of the defendant. However, it underscores a political theme that permeates the manual: There are times when it is necessary and honorable to take the law into one's own hands. The idea may seem extreme to many, but it is a political theory commonly espoused by militant militias and others. Hit Man may be a how-to book, "a training book for assassins,"[41] but it is a why-to book as well. In fact, the Fourth Circuit opinion opens with this quotation from Hit Man:

> A WOMAN RECENTLY ASKED HOW I could, in good conscience, write an instruction book on murder.
>
> "How can you live with yourself if someone uses what you write to go out and take a human life," she whined.
>
> I am afraid she was quite offended by my answer.
>
> It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for "personal" justice. . . .
>
> By the time you collect the balance of your contract fee, the doubts and fears of discovery have faded. Those feelings have been replaced by cockiness, a feeling of superiority, a new independence and self-assurance.
>
> [E]verything seems to have changed.
>
> The people around you have suddenly become so aggravatingly ordinary. You start to view them as an irritating herd of pathetic sheep, doing as they are told, doing what is expected, following someone, anyone, blindly. You can't believe how dumb your friends have become, and your respect diminishes for people you once held in awe.
>
> You too have become different. You recognize that you made some mistakes, but you know what they were, and they will never plague you again. Next time (and you know there will be a next time), there will be no hesitation, no fear.
>
> Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. *You no longer need a reason to kill.*
>
> . . . . You are a man. Without doubt, you have proved it. You have come face to face with death and emerged the victor through your cunning and expertise. You have dealt death as a professional. You don't need any second or third opinions to verify your manhood.[42]

Offensive as many may find them, the opinions expressed in *Hit Man* are political expression. It could be argued that for most readers, such books provide a vicarious experience of manhood, defined in this way, akin to what other readers might take from a Hemingway novel. Despite the Fourth

Circuit's equating the instructions in *Hit Man* with instructions supplied by a tax protestor who also *acted* to assist others in filling out false tax forms, the court, if true to *Brandenburg,* would have distinguished *Hit Man's* speech from the speech brigaded with action of the tax protestor turned tax *preparer.*[43]

Given the graphic nature of many fictional works about murder, it is hard to see how *Hit Man* is any more likely to aid and abet in the commission of a crime than many other publications, videos and films. Perhaps the provocative nature of the how-to title and the use of the imperative help to explain the court's willingness to consider a publisher's liability for acts committed by a stranger without the publisher's knowledge or assent. One wonders how a book similar in substance to *Hit Man,* but with a different title and written in third person might have fared. Suppose this had been called "Diary of a Hit Man," or "Memories of a Hit Man," or "A Day in the Life of a Hit Man" or "Murder, He Wrote." Would the court so readily have found potential liability for the publisher of such a work? The court makes much of its need, in selecting illustrative examples from the manual, to "omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein."[44] Yet for all the court's melodramatic footnoting, it is hard to see how *Hit Man* is any more likely to provide suggestions or trigger a decision to kill than many other works of fiction and drama.

Surely, the graphic portrayal of violence in Natural Born Killers is as likely to be instructive of how one might attack a victim as Hit Man. But if these works create liability for their authors and distributors, it is hard to imagine a work of fiction or art dealing with similar themes that would not. And the courts have consistently held that the right of the public to have access to creative works and the right of creators to produce and distribute those works should not be inhibited by those members of the public who "are particularly sensitive or insensitive."[45]

Neither Natural Born Killers nor Hit Man names names--identifying potential victims as it is contended did the Nuremberg Files. But should anti-abortion activists be prohibited from naming names of those on the other side of the debate because such lists might become hit lists in the hands of troubled extremists? The profile of the violent anti-abortion terrorist is not that of the typical anti-abortion activist.[46] Yet the verdict in the Nuremberg Files case would seem to allow the potential response of the extremist to control the terms of the debate. Given current concerns about terrorism in many other contexts, it is hard to see how a prohibition on naming names could be restricted to the abortion debate. And while some would argue that eliminating negative personal attacks could only serve to civilize political discourse, our history tells us the opposite: we as a people value the freedom to criticize individuals and personalize issues. If advocacy of violence and force is to remain protected speech, along the lines of Brandenburg, and the freedom to criticize individuals including political leaders is to retain its historic importance, it is hard to see how the Nuremberg Files verdict could stand on appeal.

Yet the recent line of "aiding and abetting" decisions is troubling--for it might be argued that providing ready access to a list of names and personal information about doctors and clinics in a climate of terrorism and violence is nothing less than aiding and abetting terrorism, whatever the motives or intent of those collecting the data. Before drifting further in this direction, the Supreme Court ought to consider again the evolution of the law from Schenck to Brandenburg, giving special attention to the concurring opinions of Justices Holmes, Brandeis, Black and Douglas that helped to clarify and narrow the concept of incitement--and to draw the line between punishing illegal action and preserving belief and conscience as "sanctuaries which government could not invade."[47]

NOTES

1. Free Press, Newseum Nugget, American Journalism Review, Mar. 1999, 16. It is noted that the newspaper, the Hartford Courant, marked the 250th anniversary of Jefferson's birth in 1993 by apologizing for the editorial: "It's never too late to admit a mistake."

2. The Declaration of Independence, 1776.

3. Id.

4. 395 U.S. 444 (1969).

5. Id. at 446.

6. Id.

7. Id.

8. Id. at 447.

9. Id. at 444-45.

10. 274 U.S. 357 (1927).

11. Brandenburg v. Ohio, 395 U.S. at 447.

12. Id. at 449.

13. Id. at 447.

14. Schenck v. United States, 249 U.S. 47 (1918); Frohwerk v. United States, 249 U.S. 204 (1918); Debs v. United States, 249 U.S. 211 (1918).

15. Schenck v. United States, 249 U.S. at 52.

16. Brandenburg v. Ohio, 395 U.S. at 449 (Black, J., concurring).

17. Whitney v. California, 274 U.S. at 374 (Brandeis, J., concurring).

18. See John Frohnmayer, Out of Tune, Listening to the First Amendment, Golden, CO: North American Press, 1993, at 27 - 29.

19. Whitney v. California, 274 U.S. at 375 (Brandeis, J., concurring).

20. Id. at 376 (Brandeis, J., concurring).

21. Brandenburg v. Ohio, 395 U.S. at 456 (Douglas, J., concurring).

22. Id. at 454 (Douglas, J., concurring).

23. Id. at 456 (Douglas, J., concurring).

24. The Committee on Communications and Media Law, "Violence in the Media: A Position Paper," The Record of the Association of the Bar of the City of New York, 1997: 52:3:273 - 341, 302.

25. Id.

26. Id. at 303.

27. See, e.g., Yakubowicz v. Paramount Pictures Corp., 404 Mass. 624, 536 N.E.2d 1067 (1989); Bill v. Superior Court, 137 Cal App. 3d 1002, 187 Cal. Rptr. 625 (Ct. App. 1983); Olivia N. v. NBC, 126 Cal. App.3d 488, 178 Cal. Rpt. 888 (1981), cert. denied, 458 U.S. 1108 (1982); Zamora v. CBS, 480 F. Supp. 199 (S.D. Fl., 1979).

28. See, e.g., Waller v. Osborne, 763 F. Supp. 1144 (M.D. Ga. 1991); Watters v. TSR, Inc., 715 F. Supp. 819 (W.D. KY., 1989); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987); DeFillipo v. NBC, 446 A.2d 1036 (R.I. 1982); Walt Disney v. Shannon, 247 Ga. 402, 276 S.E.2d 580 (1981).

29. Patrick McMahon, Jury hits abortion Web site, USA Today, Feb. 3, 1999, 1A.

30. Lauren Dodge, Abortion foes hit with $107 million in damages, The Miami Herald, Feb. 3, 1999, 4A.

31. McMahon, supra note 29, at 3A.

32. Dodge, supra note 30, at 4A.

33. Id.

34. Lauren Dodge, Abortion foes, allies remain civil in court, The Miami Herald, Jan. 22, 1999, 7A.

35. McMahon, supra note 29, at 4A.

36. The Hit Man's hazards, The Miami Herald, May 2, 1998, 28A. See also John Gibeaut, Deadly Advice Targeted, ABA Journal, July 1998, 24 - 25.

37. Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), cert. denied, 506 U.S. 1071 (1993).

38. The Hit Man's hazards, supra note 36.

39. Freedom of expression case stands, Broadcasting & Cable, Mar. 15, 1999, 12.

40. Gibeaut, supra note 36, at 25.

41. Rice v. Paladin Enterprises, Inc. 940 F.3d 233 (4th Cir., 1997)

42. Id. at 235-37.

43. Id. at 245-46.

44. Id. at 239.

45. Committee on Communications, supra note 24, at 307.

46. See, e.g., David Samuels, The Making of a Fugitive, New York Times Magazine, Mar. 21, 1998, 46 - 93.

47. Brandenburg v. Ohio, 395 U.S. at 457 (Douglas, J., concurring).

Dangerous Liaison: Speech in a Climate of Violence

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Dangerous Liaison: Speech in a Climate of Violence

In February 1999 a federal jury in Portland, Oregon, ordered anti-abortion activists to pay a judgment of more than $107 million to Planned Parenthood and a group of physicians who contended that the activists' posters and web site constituted threats and were not speech protected by the First Amendment. [1] Although many reports about the case focused on the activists' graphic web site, titled the Nuremberg files, other aspects of the case are more significant for speech law. The case raises questions about regulation of speech in a climate of violence, specifically, about analysis of speech that is not, on its face, threatening.

This article suggests that the Planned Parenthood case illustrates the emergence of the law of "true threats" as an analytical approach to potentially dangerous speech. Although this approach to analysis has ties to both advocacy cases considered under Brandenburg v. Ohio[2] and "fighting words" cases under Chaplinsky v. New Hampshire[3], it may be distinguished from them in at least two ways. The most significant difference is broad reliance on the context in which speech occurs to determine what expression is protected and what is not. In addition, "threat law" cases express a preference for relying on juries, rather than judges, for that determination. The underlying rulings in the case in Oregon address, first, the defendants' motion to dismiss and motion for judgment on the pleadings (Planned Parenthood I)[4] and, later, a motion for summary judgment (Planned Parenthood II)[5]. Together, these rulings represent a microcosm of the law of "true threats" as it applies to political expression and reveal some of the problems inherent in this analysis.

I. "True Threats" in the Shadow of Advocacy and Epithets

Expression that endangers society or individuals has long presented a challenge to First Amendment analysis. The central concern has been how to separate expression that should be protected because it has value for society from expression that should not, either because it has no value or because its value is outweighed by its danger. [6] For many years, under the U.S. Supreme Court's categorical approach to speech law, it appeared that the dangerous speech could be freely regulated if it fell into one of two categories: either advocacy likely to produce imminent lawless action or "fighting words" likely to produce immediate retaliation.

Commentators rarely singled out threats for special attention. [7] This may be because they assumed that potentially threatening speech would fall under one of the two identified types of potentially dangerous speech. Or, they may have assumed that threats could be regulated in the same way that speech constituting a crime could be. (A common example of the latter is speech that would be treasonous.[8]) In either case, the possible relationship between "true threats" and other dangerous speech has not attracted a great deal of attention.[9]

The categorical approach to dangerous speech was disrupted somewhat in 1992, when the Supreme Court in R.A.V. v. City of St. Paul [10] announced that while disfavored speech such as "fighting words" could be banned outright, such expression was not entirely lacking in value and could be regulated only in a viewpoint-neutral manner. As the discussion below will suggest, R.A.V. did raise the position of threats on the radar screen of speech law, but the analysis that should apply to threats remains unclear, both as to rule and as to rationale.

A. Advocacy of Unlawful Action

The line of Supreme Court cases dealing primarily with incitement and political dissent began when the Court considered prosecutions under sedition acts in the World War I period. From these cases evolved the famous "clear and present danger" standard [11] as well as a potential distinction between advocacy of theory and advocacy of specific illegal actions.[12] The application of these ideas, however, remained unpredictable until the Court reached the 1960s.[13] Commentators generally see Brandenburg v. Ohio as the resolution of the "clear and present danger" approach to determining when speech may cross the line from legitimate political dissent into the realm of dangerous and unprotected speech.[14]

In Brandenburg the court was considering the conviction of a Ku Klux Klan leader under Ohio's criminal syndicalism statute, which prohibited advocacy of political reform through violence. The specific incident that led to the conviction was a filmed Klan rally at which 12 hooded figures, some carrying firearms, gathered around a burning cross. During the rally the defendant had made various derogatory remarks about African-Americans and Jews and had said: " 'We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken.' " [15]

Without actually addressing the comments made, the Court struck down the statute as invalid on its face. In its per curium decision, it stated that the government may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." (447) The court also stated that any valid statute must distinguish between advocating theory and advocating action.(448)

Brandenburg's two-part test for evaluating advocacy of lawless action is widely considered speech-protective. It did not, however, define advocacy or incitement and so left its reach uncertain.

In the same year and some weeks before it decided Brandenburg, the Supreme Court issued another per curium opinion, Watts v. United States,[16] which reversed a conviction under a federal statute prohibiting threats against the President. Watts was an anti-war activist who had attended a rally in Washington, D.C., and in a small-group session, had stated: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers." (706)

Taking a different view than it had in Brandenburg, the Court found that the anti-threat statute was constitutional in view of the nation's interest in protecting the President. It concluded, however, that Watts' statement did not amount to a "true threat." Instead, it was "political hyperbole." (708) In explaining its conclusion, the Court noted the context of the comment: the anti-war rally, the conditional language Watts used and the response of the crowd, which was to laugh. (707) Citing its landmark defamation decision, New York Times v. Sullivan,[17] the Court also advised that it interpreted prohibition against threats " 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " (708)

Thus, Watts appears to stand for the proposition that language that is threatening on its face, may, when viewed in context, actually be protected political dissent. Commentators, if they cite Watts at all, usually group it with the Brandenburg line of cases. [18] Some subsequent cases also seem to support that categorization.

An example is NAACP v. Claiborne Hardware,[19] a case that grew out of efforts by African-American citizens in a Mississippi county to organize a boycott of white-owned businesses. In the course of the organizing effort, civil rights leader Charles Evers warned those at rallies that they "better not be caught on these streets shopping in these stores until these demands are met," "[i]f we catch any of you going into them racist stores, we're gonna break your damn neck," and, additionally, that boycott violators should not expect that the sheriff would be able to sleep with them. (902, 934-939)

The Court recognized that Evers' language might have been seen as "inviting an unlawful form of discipline" or "intending to create a fear of violence, whether or not improper discipline was specifically intended." (927) Nonetheless, the Court found that the speech did not "transcend the bounds of protected speech set forth in Brandenburg". (928)

In explaining its decision, the Court emphasized both the tone of the speeches and the lack of subsequent violence. It wrote: "The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct." (928)

The latter was a question that the Court did not have to reach since it saw no finding that violence occurred in the wake of the speeches. "There is no evidence -- apart from the speeches themselves -- that Evers authorized, ratified, or directly threatened acts of violence," the Court wrote. Citing the same language from New York Times that it had in Watts, the Court stated that any different ruling regarding Evers' speech would "ignore the 'profound, national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.' "(928)

Since the Court specifically distinguished Evers' comments from direct threats, Claiborne Hardware might seem to suggest that the existence of "true threats" should be evaluated under Brandenburg. That is, however, not the only possibility. Both logic and some cases raise the possibility that threats might fall under the "fighting words" doctrine.

B. "Fighting Words" and Threats

The "fighting words" doctrine is generally traced to Chaplinsky v. New Hampshire, which involved an exchange between a local marshal and Chaplinsky, a Jehovah's Witness, who was handing out literature on the streets of Rochester, New Hampshire. After a disturbance with local citizens had broken out and the marshal had intervened, Chaplinsky told him: " 'You are a Goddamned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.' "[20] Chaplinsky was charged and convicted under a statute that prohibited offensive and derisive name-calling. The Supreme Court upheld the conviction.

The Court explained that some words "by their very utterance inflict injury or tend to incite an immediate breach of peace" and therefore are "no essential part of any exposition of ideas and are of such slight social value" that their benefit is outweighed by the threat they present to social order. (572) Regulating these words would cause no harm to free speech, the Court reasoned.

Thus, the "fighting words" doctrine seemed specifically aimed at epithets uttered in circumstances where a breach of the peace might result. It has been suggested that "fighting words" were unprotected either because they were not valuable as "exposition of ideas" or because they were closely akin to unprotected action. [21]

For a number of years after Chaplinsky, however, it appeared that situations in which "fighting words" would be found had been narrowed by application of the vagueness and overbreadth doctrines. This seemed particularly true when the speech did not involve face-to-face insults, but the approach swept with it some cases involving threatening language.

An example of the latter is Gooding v. Wilson,[22] in which the court struck down a Georgia statute prohibiting "opprobrious words or abusive language." The defendant in that case had, in the course of an anti-war protest and altercation, told police officers: "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." (520, fn. 1)

Even though the Court invalidated the statute, it made clear that its ruling did not mean the language should be seen as protected speech. It suggested, in fact, that "the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute." (520) Thus, as to"fighting words" that may also be threatening speech, the application of the vagueness and overbreadth doctrines appears to have been primarily a lesson in drafting for Congress.

It is also a lesson that seems well-learned. Congress has enacted and courts have upheld a wide variety of anti-threat statutes, from prohibiting threats against the federal officers performing official duties to prohibiting threats involving interstate commerce in general to prohibiting threats against persons exercising certain federally protected activities, including the seeking of or providing of abortion services. [23]

The position of threats as a significant part of speech law may have been confirmed in R.A.V, in which the Supreme Court announced an entirely new approach to the "fighting words" doctrine. In R.A.V. the court was faced with a Minnesota law that had been construed as a ban on "fighting words" that involved symbols known to "[arouse] anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender." [24] The Court found the statute unconstitutional. "Fighting words," the Court explained, often have expressive content and can be regulated only in a viewpoint-neutral manner. (384-385) It concluded that the Minnesota law discriminated between the listed biases and others such as political affiliation, union membership or sexual orientation. (391) The court, however, distinguished regulation of threats.

"When the basis for the content discrimination consists entirely of the very reason the entire class of speech is proscribable," the Court wrote, "no significant danger of idea or viewpoint discrimination exists." (388) It used the law barring threats against the President as an example. The government could single out a particular kind of threats -- those against the president -- "since the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) will have special force when applied to the person of the President." In contrast, the government could not ban only those threats against the President that involved an attack on specific policy.

R.A.V., which produced strongly worded dissents, is hardly a model of clarity. It may imply that threats are themselves a special category of speech, one which is likely to be easily regulated because most anti-threat laws will be aimed at the particular characteristics that make threats disfavored in the first place. On the other hand, threats may have been mentioned in the opinion only to make clear that the Court was not striking down specific anti-threat statutes on viewpoint grounds. If the Court meant the former, then it confirmed a path that lower courts had already taken. If it meant the latter, then the Court was simply providing another citation for the proposition that threats can be prohibited. In short, as the discussion below will show, lower courts had already devised an approach to "true threats" that is quite apart from Brandenburg and Chaplinsky.

II. Application of Threat Law in the Planned Parenthood Case

A. The Rejection of Brandenburg

The first published opinion in the Planned Parenthood case came in response to the defendants' motion to dismiss and motion for judgment on the pleadings. At that point, the plaintiffs' allegations focused on a "wanted" style poster, called the "Deadly Dozen List" that the defendants had distributed, as well as a second round of similar posters that targeted individual physicians. According to the court, the poster listed 13 physicians, including some of the plaintiffs, and stated that they were "guilty of crimes against humanity. " [25] It also contained identifying information, such as home addresses and phone numbers, and a "$5,000 reward for information leading to the arrest, conviction and revocation of license to practice medicine."

The plaintiffs contended that the posters constituted a "true threat" not because of their facial meaning but because defendants made threatening statements in connection with their release, because federal officials offered around-the-clock protection to the doctors after their release, and because attacks on physicians, including three murders, had occurred after those physicians had been identified in similar posters. Plaintiffs based their claims on federal anti-racketeering statutes and, significantly for the First Amendment, the Freedom of Access to Clinics Act of 1994 (FACE)[26], which prohibits intimidation of abortion providers by force, threat of force or physical obstruction.

In their motion, the defendants argued, among other things, that their posters were protected by the First Amendment because they did not constitute "fighting words". (1370) According to the court, the defendants contended that the "fighting words" doctrine did not apply because their speech neither incited imminent violence nor was likely to produce the violence. This standard appears to intermingle Chaplinsky and Brandenburg, but the court apparently saw no reason to address this issue as it rather quickly and with minimal discussion rejected defendants' position.

" Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory [cite omitted]... but rather allege that Defendants intended to harm specific Plaintiffs, as evidenced by Defendants' threats," the court wrote, citing United States v. Dinwiddie,[27] another FACE case. "The Brandenburg test applies to laws that forbid inciting someone to use violence against a third party. It does not apply to statutes, like FACE, that prohibit someone from directly threatening another person."(1371,fn.13)

The court acknowledged that threats must be distinguished from protected expression and advised that the issue in the case would be whether defendants' expression constituted a "true threat." The court then reviewed the applicable law and addressed three points the defendants had raised: First, the court said, the test for evaluating threats is objective and does not limit potential threats to those that are express. Second, expression may be found to be a threat even though it is announced publicly instead of communicated privately. Finally, the determination of whether a "true threat" exists is a question for the jury, not a question of law for the judge. (1372, fn. 14) The court concluded that the defendants had failed to show that the plaintiffs would be unable to state a claim showing a threat and gave the plaintiffs leave to amend their complaint.

The court's treatment of Bradenburg seems to be common in threat law cases. Most courts seem certain that under Watts, threats can be barred, as long as they are "true threats." For example, U.S. v. Brock[28], another FACE case, citing Watts, advises that "[i]t is well settled that, notwithstanding the 'fighting words' and subversive advocacy doctrines, the First Amendment does not prohibit Congress from outlawing threats." (857, fn.7)

It is true that Watts and R.A.V. confirm that Congress can prohibit threats. That would explain why most anti-threat statutes are facially valid. It does not explain why further analysis in these cases should be divorced from the underpinnings of advocacy law or "fighting words," both doctrines aimed at separating protected speech from dangerous speech. Consider the characteristics that R.A.V. listed as justifying regulation of threats: threats expose individuals to the fear of violence, to the disruption that fear engenders and to the possibility that violence will occur. These characteristics could equally describe unprotected advocacy, particularly in a situation like that in Claiborne Hardware when what appeared to be threatening language was part of advocacy. Similarly, "fighting words," while they might cause an individual to retaliate against the speaker, could also produce fear, disruption and increased likelihood of other violence apart from the retaliation itself.

It is possible that courts assume that the analysis applied to potential threats is roughly equivalent to that used in advocacy or "fighting words" cases. The absence of a clear test to guide that evaluation is one indication that such an assumption would be misguided. Another indicator is the preference for turning the determination over to juries. That approach is less favored in other First Amendment areas. [29]

Rather than focusing on rationale, courts seem to have assumed that threats, unlike unprotected advocacy or "fighting words," will be easy to spot. Perhaps for language that is threatening on its face, this is true. Then, you have a true Watts case, in which the question would be whether what appears to be a threat is actually a "true threat".

The definition of threat, however, has veered off in another direction. The definition now may include threats by implication or context. These cases present an inverse of Watts, in which the question is whether what *does not* appear to be a threat actually *is* one. The summary judgment ruling, described in Planned Parenthood II, indicates how this analysis plays out.

B. The Focus on Context

By the time that the federal court in Oregon considered the defendants' motion for summary judgment, the factual basis for the case was more clearly defined than it had been at the time of the motion to dismiss. The plaintiffs had identified several specific items as threats: (1) the "Deadly Dozen" poster(s), (2) a poster focusing on plaintiff Crist (3) bumper stickers reading "Execute Murderers/Abortionists" and (4) the Nuremberg files, both in print and Internet web site form.[30]

The identified speech in each item did not, on its face, express a direct threat. Instead, the expression might be described as name-calling accompanied by requests that readers or viewers act as something like hall monitors for the anti-abortionists. The court noted these aspects of each item:

The Deadly Dozen posters, the court stated, emphasized the following statement by boldness or size of type: " 'GUILTY OF CRIMES AGAINST HUMANITY *** THE DEADLY DOZEN *** $5,000 REWARD *** ABORTIONIST.'" In smaller type, the poster listed the names, addresses and telephone numbers of 12 people, including some plaintiffs. Also in smaller type, it made a statement about prosecution of abortion as a war crime during the Nuremberg trials in 1945 and 1946 and stated that the reward was for " 'information leading to arrest, conviction and revocation of license to practice medicine.' "

The Crist poster, according to the court, emphasized the words "GUILTY OF CRIMES AGAINST HUMANITY," "Abortionist Robert Crist, " "$500 REWARD" and "ABORTIONIST. " In smaller type it also included a reference to the Nuremberg trials and identifying information about Crist, including addresses and a photograph. Also in smaller type, the poster included a request to "Please write, leaflet or picket his neighborhood to expose his blood guilt. Ask Crist to turn from killing and injuring women and children, to helping and healing those in need." The poster explained that the reward was for "successfully persuad[ing] Crist to turn from his child killing..."

The bumper sticker, the court said, read, in large black type, "EXECUTE" and to the right in red letters "Murderers" with the word "Abortionists" directly below that.

The Nuremberg files, the court found, appeared in print form in a box displayed at an event honoring people jailed for committing anti-abortion violence. A version of the files later appeared on the Internet under the heading "VISUALIZE Abortionists on Trial," followed by a statement that one of the defendant organizations was "cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity." The site also contained names of about 400 people grouped into categories "ABORTIONISTS: the shooters," "CLINIC WORKERS: their weapons bearers," "JUDGES: their shysters," "POLITICIANS: their mouthpieces," or "MISCELLANEOUS BLOOD FLUNKIES." In many cases, the listing included personal identifying information. One plaintiff was named and identified by photo in a section labeled "THIRD TRIMESTER BUTCHERS." Readers were advised that they might want to "share [their] point of view with this 'doctor' " and were urged to supply information about "the butchers in your state who do partial birth and third trimester abortions." At several points, the site also included drawings that appeared to be dripping blood.

In addition to detailing these aspects of the defendants' actual expression, the court noted that the plaintiffs had responded to the posters by increasing precautions for their own personal security. The court also found substantial evidence that the defendants "were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement." (1199-2000)

In ruling on the summary judgment motion, the court's first task was to identify the applicable rule for determining whether a "true threat" existed. The court identified these options, presented by the parties and amicus curiae:

Defendants focused on the fact that their statements were facially non-threatening. They argued that when this is so, context should not be considered. In support of their argument, they contended that the Ninth Circuit had adopted a Second Circuit holding that prohibitions against threats could be constitutionally applied only " '[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, so as to convey a gravity of purpose and imminent prospect of execution.' "(2002)

The plaintiffs, on the other hand, contended that the Ninth Circuit had not adopted the test cited by the defendants but instead followed an objective test for determining whether a "true threat" existed, specifically "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the threat as a serious expression of intent to harm or assault." The plaintiffs also contended that, even as to facially non-threatening language, "alleged threats should be considered in light of their entire factual context, including surrounding events and the reaction of listeners."(2004-2005)

Amicus curiae the American Civil Liberties Union agreed with the plaintiffs that the Ninth Circuit had adopted an objective test, but argued that the Planned Parenthood case was substantially different from other threat cases decided in the Circuit and proposed a different two-part test. Under the ACLU's proposal, a "true threat" could be found if (a) in the light of relevant context, a reasonable recipient of the communication would perceive the statement as a threat and (b) the speaker intended that the communication be taken as a threat to do serious harm, regardless of whether the speaker actually intended to carry out the threatened action. (2007-2009)

After reviewing Ninth Circuit cases, the trial court determined that the plaintiffs were substantially correct in their statement of the law. (2011) The court rejected defendants' suggestion that the Circuit had adopted a test requiring a preliminary inquiry into the facial meaning of statements alleged to be a threat. The court found that context was critical in identifying a "true threat." It also reaffirmed that this determination should be left to the jury, not decided by a judge as a matter of law.

Then, the court considered the ACLU's proposed test, particularly as to a separate inquiry into intent. The court concluded that no such inquiry was required. The discussion on this point is somewhat confusing. At one point the court pointed to a comment in a Fair Housing Act case suggesting that the element of intent was " 'the determinative factor separating protected expression from unprotected criminal behavior.' "(2014) Such an understanding of intent should lead the court to require some special showing, perhaps of the nature proposed by the ACLU. Instead, the court returned to same language used to describe the determination of whether a "true threat" existed -- "the entire factual context." The Ninth Circuit, it stated, had repeatedly concluded that "intent" in threat cases means only that a defendant "intentionally or knowingly communicate" what is alleged to be a threat. The court concluded that this determination as well should be left to the jury.

In applying these principles, the court held that the Deadly Dozen poster, the Crist poster and the Nuremberg files were actionable. Despite the broad deference to jury determination, the court concluded that because of the generality of the language used and their wide dissemination, the bumper stickers could not reasonably be perceived as a threat to particular persons. It said, however, that they could be part of the context for interpreting other expression. The case proceeded to trial on this basis. (2022)

C. Comparison with Other Cases

It was, of course, the trial court's obligation to identify Ninth Circuit positions and follow them. Had the court chosen to review the law of threats in general it would have been able to cite general support for using context in evaluating speech that is alleged to be a threat. Other cases decided under FACE have taken that approach. Indeed, context is almost always significant in interpreting expression; the analysis in Claiborne Hardware is an example of its application to advocacy. But rarely is context so broadly defined and so heavily relied on -- to the exclusion of other considerations -- as in threat cases.

An example is Dinwiddie, which the court had relied on in determining that Brandenburg did not apply. In Dinwiddie, the court was reviewing a lower court finding that the defendant had violated FACE by obstructing access, using physical force and threatening to use force against abortion providers in Kansas City. [31] As to threatening language, the court considered the following statements the defendant addressed to a doctor, often through a bullhorn: " 'Robert, remember Dr. Gunn [a physician who was killed in 1993 by an opponent of abortion] .... This could happen to you ... He is not in the world anymore... Whoever sheds man's blood, by man his blood shall be shed....' " The court also cited this statement to the Planned Parenthood director for the area: " 'Patty, you have not seen violence until you see what we do to you.' "

The court recognized that the comments were not threats in the form of "I will harm you" but found that not dispositive. Instead, the court pointed to the importance of context in identifying threats and listed a number of factors that might be considered: reaction of the person targeted or other listeners, use of conditional or unconditional language, direct communication to the recipient, the making of similar threats to others, and a reasonable belief by the recipient that the speaker had a propensity to engage in violence. As the court also noted, "This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive." (925)

In applying this approach, the court cited the following evidence in support of a finding that the defendant, Mrs. Dinwiddie, had issued a "true threat": Mrs. Dinwiddie made the statements not once or twice, but about 50 times. She communicated them directly to the recipient, who responded by wearing a bullet-proof vest. She was known to support the view that use of lethal force against abortion providers is justifiable. And, she had attacked, physically obstructed or made similar comments to others.

As to the similar comments, the court later suggested that general advocacy of the justifiable homicide doctrine would be protected under the First Amendment. But, it said, the otherwise protected advocacy could be used to demonstrate how additional remarks might reasonably have been interpreted. It analogized the situation to use of comments to prove motive. (926, fn.10)

Dinwiddie's description of context was applied in another FACE case, Lucero v. Trosch.[32] In that case, a doctor who provided abortion services sued Father Trosch, a priest who was an outspoken advocate of the view that killing abortion providers is justifiable homicide. At issue were statement Father Trosch made when he and Dr. Lucero were both guests on the Geraldo Show. Among the comments Father Trosch made in response to the host's questions were these: Asked if he would murder an abortion provider, Father Trosch replied : "'I would not murder him but I would kill him. There's a difference.' " Asked if he supported the actions of the man who killed Dr. John Britton [an abortion provider who was slain in Pensacola, Florida], Father Trosch replied: " 'I would approve of the killing, but it would not be murder.' " Asked if he specifically would kill Dr. Lucero, who was sitting beside him, Father Trosch said: " 'He is a mass murderer and should be dead.' " Asked how he could let Dr. Lucero leave the studio alive, Father Trosch suggested that he himself was more valuable raising theological questions than " 'taking him [Dr. Lucero] out.' "(1127)

In an order following a non-jury trial, the court concluded that the comments did not violate FACE. In applying the contextual approach to analysis, the court focused on the nature of the talk show as well as the actual comments themselves and Dr. Lucero's lack of additional contact with Father Trosch.

The talk show, the court said, "explores and exploits controversial subjects and guests in order to boost its ratings. Father Trosch's comments were made, it said, as "[t]he host of the show repeatedly prodded his guests in an effort to make them express their views in the most volatile manner possible." (1129) Although Dr. Lucero had testified that he was frightened and intimidated by the remarks, the court discounted this testimony. (1130) It noted that Dr. Lucero agreed to appear on the show already knowing of Father Trosch's viewpoints and the nature of the show. It also pointed out that Dr. Lucero had never seen Father Trosch at his home or at his clinic. Finally, the court characterized Father Trosch's statements as extreme, but it also saw his emphasis on his role as purveyor of philosophical questions as tending to temper the actual language he used.

The court acknowledged that the statements Father Trosch made were similar to those made by Mrs. Dinwiddie, but it pointed out these distinctions: her statements were made many times, not once, were made by bullhorn outside a clinic and could be interpreted in light of her violent actions on other occasions. (1131)

The court in Lucero also specifically addressed expert testimony that had been offered about the climate of violence faced by abortion providers. The court characterized the expert's opinion as indicating that the threat to Dr. Lucero stemmed from the general climate of violence, which was heightened by Father Trosch's comments. The court concluded that it could not "hold Fr. Trosch liable under FACE either for the dangerous atmosphere facing abortion providers today or for his impassioned advocacy of the 'doctrine of justifiable homicide' in the absence of a threat of force directed at Dr. Lucero." (1131, fn. 12)

Despite its conclusion, the court warned, Father Trosch should not take comfort in its ruling. The court suggested that in another context, the same remarks would be a violation of FACE.

Neither Dinwiddie nor Lucero undertook a separate analysis of intent. That is, they did not inquire whether the defendants actually intended to threaten. Instead, it appeared to be sufficient that the defendants made the statements knowingly, not by inadvertence or mistake. Since this is so, any examination of context sufficient to determine whether a statement constituted a "true threat" would be more than adequate to distinguish between inadvertent comments and those knowingly made. This, in turn, means that the examination of context controls both questions, as the discussion in Planned Parenthood II seemed to say.

III. Questions Raised by the Current Analysis of "True Threats"

If the First Amendment is protected in "true threat" cases like these, it will have to be by contextual analysis. Presently, that is an amorphous inquiry, leading to uncertain outcomes. Although uncertain outcomes are not unusual in speech cases, it is unusual to have no defined test and great deference to the jury. The ultimate question is: Is this enough? Most likely, that will be a question for the Ninth Circuit and potentially the Supreme Court. In the course of the appellate process, it might be hoped that we would get answers to the many questions presented by this degree of reliance on context, including the following:

1. In light of the historical connection between Brandenburg and Watts and the frequent connection between political advocacy and potentially threatening statements, why should none of Brandenburg's principles apply to the determination of whether particular language actually constitutes a threat?

2. What is the rationale for making so much of the threat determination a jury question when speech law in other areas expresses a preference questions of law?

3. In the consideration of context, is there no difference between speech that is threatening on its face and speech that is not? Should not the plaintiff face a somewhat higher burden when attacking the latter sort of statement?

4. How can context insure that a distinction is made between protected speech that may contribute to a climate of violence and speech that actually presents a "true threat"? Is it significant that silencing the speech will not end the fear felt by people who were exposed to it? Or, have we reached the point where, in a climate of violence, any comment to a specific individual may be considered a threat?

Endnotes

[1] See, e.g., "Creators of Anti-Abortion Web Site Told to Pay Millions," The New York Times 3 February 1999, Late Edition-Final.
[2] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[3] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[4] Planned Parenthood v. American Coalition of Life Activists, 945 F.Supp. 1355 (D.Or. 1966)(Planned Parenthood I).
[5] Planned Parenthood v. American Coalition of Life Activists, 23 F.Supp.2d 1182 (D. Ore. 1998)(Planned Parenthood II).
[6] See John E. Nowak, Ronald D. Rotunda and J. Nelson Young, Constitutional Law, 2nd Ed. (St. Paul, Minn.: West Publishing Co., 1983), 873.
[7] Ibid., 874-886, 954-958.
[8] For additional examples see Rice v. Paladin, 128 F.3d 233 (4th Cir. 1997), 259-260.

[9] For an exception to this observation, see Robert Trager and Donna L. Dickerson , Freedom of Expression in the 21st Century (Thousand Oaks, Calif.: Pine Forge Press, 1999) 113-119.
[10] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); see also David R. Dow and R. Scott Shields, "Rethinking the Clear and Present Danger Test," 73 Ind. L. J. 1217 (Fall 1998).
[11] See Donald A. Gillmor, Jerome A. Barron and Todd F. Simon, Mass Communication Law: Cases and Comment , 6th Ed. (Belmont, Calif.: Wadsworth Publishing Co. 1998), 13-27.
[12] Yates v. United States, 354 U.S. 298 (1957).
[13] Brandenburg, 1833, J. Douglas, concurring.
[14] See, e.g., Nowak, Rotunda and Young, Constitutional Law, 885.

[15] Brandenburg, 446.
[16] Watts v. United States, 394 U.S. 705 (1969).
[17] New York Times v. Sullivan, 376 U.S.254 (1964).
[18] See Nowak, Rotunda and Young, Constitutional Law, 883; for a different view, see Robert Kurman Kelner, "Note: United States v. Jake Baker: Revisiting Threats and the First Amendment," 84 Va. L. Rev. 287 (March 1998).
[19] NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).
[20] Chaplinsky, 569.
[21] Gillmor, Barron and Simon, Mass Communication Law, 123.
[22] Gooding v. Wilson, 405 U.S. 518 (1972).
[23] For a listing of statutes, see Lucero v. Trosch, 904 F.Supp. 1341, 1344 fn. 8 (S.D.Ala. 1966).
[24] R.A.V., 380.
[25] Planned Parenthood I, 1362-1363.
[26] FACE, 18 U.S.C, section 248.

[27] United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996)
[28] United States v. Brock, 863 F.Supp. 851 (E.D. Wis. 1994)
[29] See Kelner, "Note: United States v. Jake Baker," 289-290.
[30] Planned Parenthood II, 1192-1199.
[31] Dinwiddie, 917.
[32] Lucero v. Trosch, 928 F.Supp. 1124 (S.D.Ala. 1966)